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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
v. *Petitioner,*

AT & T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

**Petition for a Writ of *Certiorari* to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Whether a state law cause of action filed in state court by an employee covered by a collective bargaining agreement is completely preempted by § 301 of the Labor Management Act, 29 U.S.C. § 185, and therefore removable to federal court, where the claim as pleaded, and as fairly read, does not necessarily require the interpretation or application of the agreement, yet the agreement's construction may be an issue in the event that the defendant employer seeks to rely upon the agreement as part of a negating or affirmative defense?

2. Whether a state law claim for intentional infliction of mental distress filed in state court by an employee covered by a collective bargaining agreement is completely preempted by LMRA § 301 and therefore removable to federal court, whenever the actions complained of involve workplace behavior by the employer or an agent of the employer?



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**Petition for a Writ of *Certiorari* to the
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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner William T. McCormick hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in *McCormick v. AT&T Technologies, Inc., et al.*, 934 F.2d 531 (4th Cir. No. 88-3542, May 28, 1991) (*en banc*).

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit is reported at 934 F.2d 531 (1991), and is reprinted in the separately bound appendix to this *certiorari* petition ("Pet. App.") at pp. 1a-33a. The United States District Court for the Eastern District of Virginia did not issue a written opinion; a transcript of its oral opinion is reprinted at Pet. App. 35a-39a, and a copy of the district court judgment is reprinted at Pet. App. 34a.

JURISDICTION

The Fourth Circuit issued its *en banc* decision and judgment on May 28, 1991. On August 15, 1991, the Chief Justice signed an order granting an extension of time within which to file a petition for writ of *certiorari* to and including September 25, 1991. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. § 1441 provides:

Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

STATEMENT OF THE CASE

A. The Facts

Petitioner William T. McCormick was an employee of respondent AT&T Technologies, Inc. ("AT&T" or the "Company") until his discharge in October, 1986. McCormick worked at a facility covered by a collective bargaining agreement between AT&T and the Communications Workers of America. Although the incidents underlying this lawsuit occurred at about the same time as

McCormick's termination, this suit seeks to recover for injuries caused not by the discharge but by the Company's handling of certain of petitioner's personal property. Pet. App. 2a-3a, 7a.

As an AT&T employee, McCormick was issued a secure locker in which he kept both tools issued by his employer and personal property. That property included a letter from his ex-wife containing information that was private and, if revealed, would be extremely embarrassing to McCormick. Pet. App. 3a; Court of Appeals Joint Appendix ("C.A. Jt. App.") 61-62.

In late September, 1986, McCormick was ill for several weeks and did not report to work. Contending that McCormick did not keep the Company adequately informed about his absence, AT&T terminated his employment by a letter dated October 1, 1986. Pet. App. 2a.

The very next day, his supervisor cleaned out McCormick's locker and discarded his personal property, including the letter from McCormick's ex-wife, in a trash receptacle accessible to all employees. A fellow employee did, in fact, retrieve and pass the letter around to all the employees on McCormick's shift. Pet. App. 3a; C.A. Jt. App. 55.

When McCormick received AT&T's termination letter, he contacted the Company and arranged a meeting to discuss the discharge. At that meeting, held on October 3, 1986, McCormick stated that he knew that all the employees on his shift had seen the letter in question, and voiced his apprehensions on how its contents would be used. As a result of the meeting, AT&T vacated McCormick's discharge and returned him to his former position as of that night. Pet. App. 3a; C.A. Jt. App. 60-62.

As soon as McCormick arrived on the job, however, a fellow employee made a personal remark to him based upon the contents of the letter that caused petitioner such embarrassment and distress that he asked to be allowed

to leave the plant immediately. When this request was refused, McCormick left anyway, aware that his termination would be reinstated as a result. Pet. App. 3a; C.A. Jt. App. 55.

B. The Proceedings Below

(a) *District Court Proceedings*: McCormick filed a common law tort suit in the Virginia courts seeking to recover for the emotional and physical distress he suffered as a result of the exposure of his private affairs to a large number of his fellow employees. The complaint alleged generally that McCormick's supervisor knew that McCormick was in a weakened mental and emotional condition; that the exposure of his personal property caused McCormick mental, emotional and physical traumas; and that McCormick's supervisor knew or should have known that these injuries would occur from the actions taken with regard to the disposal of petitioner's property, but, either negligently or intentionally, carried out those actions anyway. Four common law causes of action—for intentional and negligent infliction of emotional distress, conversion, and negligence in the care of a bailment—were pleaded. Pet. App. 3a; C.A. Jt. App. 11-15.

AT&T removed the case to federal court, contending that McCormick's state tort causes of action are completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185; that his claims are in truth federal claims resting on the applicable collective bargaining agreement; and that his case should therefore be dismissed because barred by the applicable § 301 statute of limitations. C.A. Jt. App. 27-28.

On cross motions by McCormick for a remand and by AT&T for summary judgment, the district court refused to remand the case to state court, and granted summary judgment to the Company "[b]ecause the claims arise from conditions of employment governed by a collective bargaining agreement." Pet. App. 39a.

(b) *Fourth Circuit Majority Opinion*: On appeal, the Fourth Circuit decided, after briefing and argument in front of a three-judge panel but before opinion by that panel, to hear the case *en banc*. The full appeals court divided 4-3 on the pivotal legal issue in the case.

Writing for the four-judge majority, Judge Chapman, joined by Judges Russell, Widener and Wilkens, held that there is "complete preemption" of the state law claim in this case under *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and its progeny. The majority held that § 301 completely displaces state law claims implicating an employment relationship whenever resolution of the claim could involve interpretation of an applicable collective bargaining agreement. As a consequence, the majority held, this case arises under federal law, federal court jurisdiction is proper, and the grant of summary judgment for failure to meet the applicable statute of limitations was correct. Pet. App. 13a-14a.

In the majority's view, each of McCormick's common law causes of action *could* be defended on the basis that AT&T owed petitioner no state law duty to keep his private property, locked in a secure locker, away from fellow employees, because the collective bargaining agreement authorized the Company to dispose of the property as it did. Pet. App. 10a. In so ruling, the majority pointed to no provision of the collective bargaining agreement that regulates lockers or disposal of employee private property generally, or that in terms permits AT&T to expose an employee to public ridicule by allowing fellow employees access to embarrassing private property the employee kept in a secure locker to which those employees had no access. Rather, the Fourth Circuit majority relied only upon a broad and vague management rights clause, providing generally that "the right to manage the business and to direct the working forces and operations of the same, subject to the limitations of this Agreement, is exclusively vested in, and retained by, the Company". Pet. App. 9a.

The majority below maintained that the answer to the question whether AT&T is legally entitled under Virginia law to dispose of McCormick's property as the Company did might ultimately involve arguments based upon the interpretation of the management rights clause of the collective bargaining agreement, as upon implied rights and duties under the agreement. That possibility, according to the majority, is sufficient to destroy petitioner's state tort law causes of action entirely. Pet. App. 9a-10a.

(c) *Fourth Circuit Dissenting Opinion*: Writing in dissent, and joined by Judges Sprouse and Murnaghan, Judge Phillips "disagree[d] fundamentally with the majority's view of the way in which the preemptive effect of § 301 upon state-law tort claims is to be analyzed." Pet. App. 19a.

Judge Phillips noted, first, that § 301 provides a federal cause of action only for suits for violation of collective bargaining agreements, not for suits "to enforce any claim by a union-employee against his employer or union that arises out of or is connected with his employment relationship, or that somehow touches on matters that might be the subject of labor relations." Pet. App. 22a. This Court's § 301 preemption cases, in the dissent's view, consequently limit preemption to state-law claims explicitly alleging violations of labor contracts and those claims that "can be determined to be claims for violations of labor contracts in substance though not in form." Pet. App. 23a. And, as the dissent read this Court's cases, the latter category of cases can be determined by "focus[ing] on where the *claimant* has located the duty allegedly breached by the employer or union-defendant." Pet. App. 23a (emphasis supplied).

Under this "claimcentered" approach (Pet. App. 26a), there is no preemption as long as the claim as defined under state law *could* impose a *noncontractual* duty and the plaintiff does not rely on any contractual source for the legal duty the defendant is alleged to have violated.

Where those conditions are met, then “a defendant’s assertion . . . that a labor contract’s terms provide either a negating or affirmative defense to the claim are irrelevant to the preemption issue.” Pet. App. 27a. At the same time, “to the extent that [the] ultimate resolution [of the case] requires interpretation of a labor contract’s terms, . . . federal law controls the interpretation [only].” Pet. App. 27a.

Applying this approach to the present case, the dissenters concluded that, as pleaded, each of McCormick’s common law causes of action located the duty alleged to have been violated in general state tort law duties owed to all persons as a matter of law, and not in the collective bargaining agreement or in any other contract. In the dissent’s view, therefore, these state law claims can go forward in state court, subject to the understanding that AT&T is entitled to raise as a defense the contention that the labor contract authorized the actions taken, so that those actions could not be determined to be “outrageous”, “negligent” or “wrongful”. Pet. App. 28a-32a.

REASONS FOR GRANTING THE WRIT

Introduction

In a case decided exactly one week before the present one—and in an opinion holding squarely the opposite of the holding here—the Ninth Circuit began by stating

At first blush, both the rationale and method of analysis in [Labor-Management Relations Act § 301] preemption cases are straightforward Nor are we deprived of authoritative statements to guide our way. *Lingle [v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)]* is one, *Allis-Chalmers [Corp. v. Lueck, 471 U.S. 202 (1985)]* is another.

In reality, section 301 has been the precipitate of a series of often contradictory decisions, so much so that “federal preemption of state labor law has been

one of the most confused areas of federal court litigation.” *Note, The Need for a New Approach to Federal Preemption of Union Members’ State Law Claims*, 99 *Yale L. J.* 209 (1989). [*Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).]

The Ninth Circuit’s characterization of the litigation generated by LMRA § 301 preemption as “one of the most confused areas of federal court litigation” is not hyperbole but an eminently fair characterization of the chaotic situation in the courts of appeals.

To be sure, this Court, recognizing the importance of the questions presented here, has sought to delineate for the lower courts the circumstances in which the § 301 federal common law of labor contracts precludes state causes of action from going forward where the plaintiff is an employee covered by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). *See also Steelworkers v. Rawson*, — U.S. —, 110 S. Ct. 1904 (1990).

Despite the attention this Court has paid to this problem, however, the lower federal courts continue to be flooded with cases raising § 301 preemption issues, and continue to disagree with one another on the proper method of analyzing these issues.

Indeed, the four-three division in the Fourth Circuit, sitting *en banc* in the present case, is symptomatic of the division in the circuits. Each opinion in the present case relies on decisions from other circuits that do indeed support that opinion, and that, by definition, are in hopeless conflict with still other circuit court decisions. *See* Pet. App. 29a n.4 (Phillips, J., dissenting) (conceding that the majority opinion below properly notes that its preemption holding on the intentional infliction of mental distress count is in accord with those of three circuits, but

noting that two other circuits support the dissent's view, while a third has ruled both ways.)

This case squarely presents for decision two critical aspects of this continuing controversy:

First—as the compelling analysis in the dissenting opinion in this case shows—much of the confusion in the lower courts results from a disagreement as to whether § 301 preemption law is “claim-centered”; *viz.*, as to whether preemption turns only upon the *plaintiff's* need to rely upon the applicable collective bargaining agreement as one of the essential elements pleaded in the complaint *or* turns as well on the need to consult that agreement in resolving the case because the *defendant* intends to rely on the agreement as a defense.

As to that question, there is the plainest of circuit conflicts:

The First, Fourth, Eighth and Ninth Circuits hold that a defendant can indeed defeat a state cause of action simply by announcing that the defendant intends in some way to rely upon an applicable collective bargaining agreement as part of its *defense*.

The Sixth and Tenth Circuits hold squarely to the opposite.

And, while both the language and the underlying rationale of this Court's cases as a whole clearly favor the approach of the dissent in this case—which is also the approach of the Sixth and Tenth Circuits—there is at least one sentence in *Lingle v. Norge Division of Magic Chef, Inc.*, *supra*, that suggests otherwise, and that appears to be a contributing cause to the lower courts' disarray. Pp. 10-16, *infra*.

Second, there is a multi-faceted circuit conflict—with a split that does not precisely mirror the one as to the “claim-centered” controversy—on whether state causes of action for intentional infliction of emotional distress

growing out of the manner in which a discharge or other discipline is carried out, available in a increasing number of states, are completely preempted by § 301 where the plaintiff is covered by a collective bargaining agreement.

The Fifth and Tenth Circuits agree with the majority in the present case that such claims are preempted.

The Third Circuit agrees with the dissent below that such claims are not preempted.

And, the Sixth, Seventh, Eighth and Ninth Circuits all hold that such claims may be preempted or not, yet apply three different standards for separating preempted state causes of action for intentional infliction of mental distress from those not preempted. Pp. 16-25, *infra*.

The attention this Court has paid to § 301 preemption questions in recent years demonstrates the importance to a coherent labor policy of a proper delineation of the role of state law employment-related causes of action in a workplace where a collective bargaining agreement governed by federal common law is in place. Since the complexity of the § 301 preemption issues presented here has led to continuing circuit conflicts, it is imperative that this Court once more draw the precise dividing line between the federal labor laws and state law.

A. The Circuit Split on the Question Whether LMRA § 301 Preemption Analysis is Claimcentered:

(1) In this case, as in many others, the state court complaint did not in terms rely upon any collective bargaining agreement at all, and there is no basis for reading the complaint as *necessarily* relying on the applicable agreement as the source of the legal duty the defendant is alleged to have violated. To the contrary, the complaint, fairly read, contends that under the applicable state law the defendant employer owed to the plaintiff employee the same duty the defendant would have owed to any individual over whose property, for whatever reason, the defend-

ant had custody, and that the defendant violated that duty. C.A. Jt. App. 11-12, 14-15.

AT&T, however, has maintained that the Company is entitled under state law to defend this case on the basis that the broad management rights clause in, or in the alternative some implied provision of, the collective bargaining agreement affirmatively sanction its actions here. It is AT&T's position that simply by raising a labor-contract-based defense—without regard to whether the defense would turn out to have any merit if put to the test—the Company renders petitioner's state law cause of action a legal nullity. Like the majority in this case, the First, Eighth, and Ninth Circuits, have accepted this breathtaking expansion of § 301 preemption.

For example, in *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), the First Circuit addressed the question of whether § 301 preempts a state law cause of action for retaliatory discharge that differed from the cause of action upheld against a preemption attack in *Lingle*, *supra*, only in that the pertinent statute provided a defense where “any right in this section is inconsistent with an applicable collective bargaining agreement.” 912 F.2d at 527, n.1. Because it would be necessary to construe the collective bargaining agreement in order to evaluate any such defense if raised, the First Circuit held the retaliatory discharge cause of action preempted. *Id.* at 530-31. *See also Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988) (holding that a state cause of action is preempted by § 301 as long as a waiver defense is available under state law).

Similarly, the Ninth Circuit, in two cases, has held that an employee's state law privacy claim is preempted whenever the defendant employer contends that the privacy right is waived by the management rights clause, or some other provision, of the applicable collective bargaining agreement. *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v.*

Calmat, 852 F.2d 430, 433 (9th Cir. 1988); see also *Newberry v. Pacific Racing Ass'n.*, 854 F.2d 1142, 1146 (9th Cir. 1988).¹

And, the Eighth Circuit, in *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988), held emphatically that "defenses as well as claims must be considered in determining whether resolution of the state law claim requires construing the collective bargaining agreement." See also *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989).

Just as emphatically, the Sixth Circuit has embraced the "claim-centered" analysis articulated in the dissenting opinion in this case, several times reiterating that "[i]t is *irrelevant* to the preemption question whether or not the employer can defend by showing it had the rights under the collective bargaining agreement to do what it did." *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) (emphasis added); see also *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) ("a defendant's reliance on a [collective bargaining agreement] term purely as a defense does not result in section 301 preemption"); *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1334 (6th Cir.) (*en banc*), *cert. denied*, — U.S. —, 110 S. Ct. 539 (1989) (that the defendant may "assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement . . . does not support removal to federal court").

¹ In *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990) the Ninth Circuit similarly held that a state law privacy claim is preempted by § 301, but did so on a slightly different basis than *Utility Workers* and *Laws*: *Stikes* purported to view the collective bargaining agreement not as a defense to a state law privacy cause of action, but as part of the plaintiff employee's *prima facie* claim because pertinent to whether the employee's claimed expectation of privacy was reasonable. 914 F.2d at 1270. See also *Schlachter-Jones v. General Telephone of California*, 936 F.2d 435 (9th Cir. 1991) (adopting a similar approach). Neither *Stikes* nor *Schlachter-Jones*, however, disavowed *Utility Workers* or *Laws*, but instead reiterated their holdings. 914 F.2d at 1268; 936 F.2d at 439-41.

Similarly, the Tenth Circuit, in *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), held that even if a state court "would find the collective bargaining agreement relevant to show waiver or consent as a state-law defense to plaintiffs' allegations," there would still be no complete § 301 preemption of a state law claim, and no federal court jurisdiction over such a claim.

In short, a more direct and pronounced difference among the courts of appeals on a basic issue critical to the decision of a recurrent issue of federal law—and, indeed, of federal jurisdiction—is difficult to imagine.

(2) One would think, from the deep split in the circuits as to the impact of collective-bargaining-agreement-dependent defenses on § 301 preemption analysis, that this Court's cases do not address the issue. To the contrary, in *Caterpillar, Inc. v. Williams*, *supra*, one question directly raised was whether "§ 301 preempts a state-law claim even when the employer raises only a defense that requires a court to interpret or apply a collective bargaining agreement," and the Court was equally direct in answering that question in the *negative*:

It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a *defendant* cannot,

merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law. [482 U.S. at 398-99 (emphasis in original).]

To be sure, as Judge Phillips notes in the dissent in this case (Pet. App. 24a-25a), there is *one* passage in this Court's *Lingle* opinion that could be read to suggest that in determining § 301 preemption issues, it is proper to anticipate defenses that may be raised and to determine whether it will be necessary to construe or apply the collective bargaining agreement in adjudicating those defenses. See 486 U.S. at 407 (surveying the elements of the plaintiff's case in a state law retaliatory discharge proceeding, and the elements of the defense thereto, and concluding, "Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for § 301 preemption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement.")

There is, however, *no* indication that *Lingle* intended so casually to overrule *Caterpillar* on a question directly raised and decided *only* in the earlier case. To the contrary, *Lingle* elsewhere in the opinion relies heavily upon *Caterpillar*, quoting language from *Caterpillar* that incorporates *Caterpillar's* "claim-centered approach."² And, *Lingle* also takes care to recognize that there may be cases in which there is a question concerning the interpre-

² That passage reads in part:

"Section 301 governs *claims founded* directly on rights created by collective-bargaining agreements, and also *claims* 'substantially dependent on an analysis of a collective-bargaining agreement' [C]ontrary to *Caterpillar's* assertion, . . . respondents' *complaint* is not substantially dependent upon interpretation of the collective bargaining agreement. *It* does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement." [486 U.S. at 410, n.10 quoting *Caterpillar*, 482 U.S. at 394-95 (emphasis supplied).]

tation of a collective bargaining agreement but *no* § 301 preemption; in that event, said the *Lingle* Court, “federal law would govern the interpretation of the agreement, but the separate state law analysis would not thereby be preempted.” 486 U.S. at 413 n.12. There can, of course, be *no* such cases under the complete preemption approach espoused by the majority below.

It is equally to the point that where, as in this case, suit is originally filed in state court, general principles of federal jurisdiction preclude reliance upon a federal *defense* as a basis for removal. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983); *Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). That principle is reiterated at the outset of *Caterpillar*, 482 U.S. at 391-92, and is referred to in the passage quoted above holding that a defense based upon a collective bargaining agreement is not a basis for § 301 preemption. Thus, to read the *Lingle* opinion as holding otherwise would be to construe *Lingle* not only as overruling *Caterpillar* but also as putting into question one of the most basic rules of “[t]he century-old jurisdictional framework governing removal of federal question cases from state into federal courts,” *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Caterpillar’s conclusion regarding the “claim-centered” nature of § 301 preemption is, moreover, the conclusion that is fully consistent with both the language and the underlying purposes of § 301: As Judge Phillips noted below, the federal statute provides federal jurisdiction and federal substantive law *only* where the plaintiff seeks to adjudicate his/her *contract-based* rights, either in form or in substance. Pet. App. 23a. Unless § 301 preemption is similarly limited, the result would be to destroy state causes of action, even though there is no suitable federal substitute. Indeed, employers could achieve this result by raising frivolous defenses; *viz.*, defenses that would have little or no chance of success if adjudicated on the merits.

The animating consideration underlying § 301 preemption—the assurance of uniformity in the interpretation and application of collective bargaining agreements³—can, moreover, be fully achieved without thus sacrificing the state law rights of employees covered by collective bargaining agreements. As Judge Phillips explained in his dissent, under the “claim-centered” approach while the plaintiff employee’s state law

action is to be resolved under state law . . . to the extent that its ultimate resolution requires interpretation of a labor contract’s term, . . . federal law controls the interpretation. [Pet. App. 27a (emphasis in original).]

Thus, *Caterpillar*’s conclusion that § 301 preemption is “claim-centered” is entirely correct. At the same time, since the confusion sowed by the courts of appeals’ various readings of *Lingle* has led to a sharp cleavage among the circuits on the question whether anticipated defenses should be taken into account in determining § 301 preemption, this Court should grant *certiorari* to clear up this matter once and for all.

B. The Circuit Split on the Question Whether LRMA § 301 Preempts State Causes of Action for Intentional Infliction of Mental Distress:

(1) The courts of appeals are divided not only on the proper overall approach to analyzing § 301 preemption

³ See, e.g., *Allis-Chalmers Corp. v. Lucick*, *supra*, 471 U.S. at 210-11:

If the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. . . . The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

problems but on the specifics of whether the increasingly common state causes of action for intentional infliction of emotional distress are preempted by § 301 where the plaintiff employee is covered by a collective bargaining agreement.

The Fourth Circuit majority in this case held that such causes of action are completely preempted by § 301 because contractual considerations are necessarily relevant in determining whether or not particular behavior is "outrageous and intolerable", an element of the state tort cause of action. Pet. App. 10a.

The Fifth and Tenth Circuits have adopted essentially the same approach, and reached the same result. *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1256 (5th Cir. 1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990). See also *Miller v. AT&T Network Services*, 850 F.2d 543 (9th Cir. 1988).⁴

At the same time, as the Tenth Circuit expressly notes in *Johnson v. Beatrice Foods*, *supra*, "other circuits have reached varying results when applying the *Allis Chalmers* and *Lingle* holding to state tort claims for intentional infliction of emotional distress." 921 F.2d at 1021. The other circuits referred to are the Third, Sixth, Seventh, Eighth and Ninth and we now detail the resulting multifaceted circuit split.

(a) *The Third Circuit*: Among the cases cited in *Johnson v. Beatrice Foods*, *supra*, as reaching "conflicting results," to that reached by the Fourth, Fifth and Tenth Circuits is *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3rd Cir. 1990).

⁴ While the *Miller* case embraces the premise that the collective bargaining agreement is necessarily relevant in such cases in order to determine whether the employer's behavior is sufficiently "outrageous," the Ninth Circuit has *not* followed that premise to the conclusion that § 301 uniformly preempts all intentional infliction of mental distress cases. See p. 21, *infra*.

In *Krashna*, the Third Circuit squarely held that, as a general matter, claims by employees covered by a collective bargaining agreement for intentional infliction of emotional distress are not preempted because such claims are "clearly outside the scope of the collective bargaining agreement and § 301 of the LMRA." 895 F.2d at 114. It is plain from the *Krashna* opinion that the Third Circuit so holds even where the employer's actions alleged as tortious involve employment conditions arguably committed to managerial discretion as an ordinary matter. See 895 F.2d at 115 n.5 (allegations of harassment in the complaint included ordering the plaintiff to work contrary to doctor's orders, unjustified disciplinary warnings, and unfair work assignments).

Under the Fourth Circuit's approach in this case, focussing upon whether the state cause of action arises from a working condition that may be implicated by the applicable collective bargaining agreement, the intentional infliction claim in *Krashna* would certainly have been preempted.

(b) *The Sixth Circuit*: The law in the Sixth Circuit is along the same line as—but slightly more complex than—the law in the Third Circuit.

O'Shea v. Detroit News, *supra*, 887 F.2d at 687, arose when the employer allegedly transferred an elderly employee covered by a collective bargaining agreement to a night shift, knowing that the employee had health problems, in order to force him to retire. Because "the News could have tortiously caused O'Shea emotional distress without violating the contract", the Sixth Circuit held the cause of action *not* preempted. *Id.* (emphasis added).

Here, as well, the state court complaint does not contend that the actions taken by AT&T were in violation of the collective bargaining agreement. Thus, under the standard applied in *O'Shea*, the present cause of action

for intentional infliction of emotional distress could not be preempted.

In two later cases, *Knafel v. Pepsi-Cola Bottlers of Akron, Inc.*, 899 F.2d 1473, 1483 (6th Cir. 1990) and *Fox v. Parker Hannifin Corp.*, *supra*, 914 F.2d at 795, the Sixth Circuit elaborated upon the standard applicable to the § 301-preemption-of-intentional-infliction-of-mental-distress cases. Drawing on this Court's holding in *Farmer v. United Brotherhood of Carpenters Local 25*, 430 U.S. 290, 302 (1977), the Sixth Circuit stated that state causes of action for intentionally inflicting emotional distress are *not* preempted as long as the claimed injury flows from the abusive *manner* in which the employer exercises its proper authority under the collective bargaining agreement (or fails to do so), and not from the "routine exercise of [collective bargaining agreement] rights" alone. *Fox*, 914 F.2d at 802; *see also Knafel*, 899 F.2d at 1483.

The Fourth Circuit majority in this case recognized *no* such distinction; had the majority below done so, its decision would have had to be that petitioner's claim is not preempted by § 301.⁵ Nor have the Fifth or Tenth Circuits suggested any "abusive manner" limit to their broad § 301 rule preempting intentional infliction of emotional distress causes of action.

(c) *The Eighth Circuit*: The Eighth Circuit also holds that most intentional infliction causes of action arising in a workplace covered by a collective bargaining agreement are *not* preempted by § 301, applying a *different* standard for making this distinction than the one suggested in the most recent Sixth Circuit cases.

⁵ Petitioner's intentional infliction cause of action does not seek to recover for emotional injuries caused by the fact that the employer cleaned out McCormick's locker and discarded his private property. Rather, the injury for which damages are sought flowed from the *manner* in which the property was discarded; *viz.*, in full view of petitioner's fellow employees, so that they were able to recover and read petitioner's private papers.

Thus, the most recent Eighth Circuit decision—*Hanks v. General Motors Corp.*, 906 F.2d 341, 344 (8th Cir. 1990)—holds that § 301 does *not* preempt a state intentional infliction cause of action where the employer assigned an employee covered by a collective bargaining agreement to work under a supervisor whom the employer knew had sexually assaulted the employee's daughter. In so doing, the Eighth Circuit *expressly* disagreed with the Ninth Circuit's approach in *Miller v. AT&T Network Service*, *supra*, in this regard (and therefore with the approach followed by the Fourth Circuit here, which parallels the *Miller* approach). *Hanks*, 906 F.2d at 344 n.4 ("Inasmuch as the opinion in *Miller v. AT&T Network Services* . . . would suggest a result different from the one indicated . . . , we disagree.")

At the same time, *Hanks* distinguished *Johnson v. Anheuser Busch*, *supra*, finding preemption of an intentional infliction claim, on the basis that in *Johnson*, but not *Hanks*, the essence of plaintiff's cause of action was that the discharge was totally improper *under* the applicable collective bargaining agreement and *therefore* "outrageous." *Hanks*, 906 F.2d at 344.⁶

The Eighth Circuit, then, holds that intentional infliction claims are § 301 preempted only where an alleged labor contract violation is itself the primary basis for demonstrating that the employer's behavior comes within the narrow range of egregious behavior that supports an intentional infliction cause of action. That the action complained of involved a working condition and, according to the employer, complied with the contract is *not* a sufficient basis for § 301 preemption. In the latter regard, the Eighth Circuit law is in direct conflict with the § 301 preemption law in the Fourth, Fifth and Tenth

⁶ In *Hanks*, for example, the employer apparently contended that its actions were in compliance with the collective bargaining agreement and, therefore, the employer could not be found to have behaved in an "outrageous" manner. 906 F.2d at 344.

Circuits and in some tension with the law of the Sixth Circuit.⁷

(d) *The Ninth Circuit*: Like the Sixth and Eighth Circuits, the Ninth Circuit, which has decided the largest number of cases in this area, finds some state law intentional infliction cases preempted by § 301 but allows others to go forward. Compare, e.g., *Miller v. AT&T Systems*, *supra*, with *Galvez v. Kuhn*, *supra*; see also, e.g., *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 239-40 (1990); *Harris v. Alumax Mill Products, Inc.*, 897 F.2d 400, 402 (9th Cir.), *cert. denied*, — U.S. —, 111 S. Ct. 102 (1990); *Newberry v. Pacific Racing Association*, *supra*, 854 F.2d at 1150 (preempted); *Tellez v. Pacific Gas & Elec. Co.*, 817 F.2d 53 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987) (not preempted); *Perugini v. Safeway Stores, Inc.*, 935 F.2d 1083, 1085 (9th Cir. 1991) (partially preempted and partially unpreempted). But the Ninth Circuit's governing preemption standard for these kinds of cases is not the same as the standard applied in either the Sixth or the Eighth Circuit toward the same end.

The most fully reasoned Ninth Circuit decision, *Galvez v. Kuhn*, *supra*, first notes that the Ninth Circuit has been more receptive to § 301 preemption claims of intentional infliction causes of action than the Seventh and Eighth circuits and then takes pains fully to review and explain the state of the Ninth Circuit's cases in this area. 933 F.2d at 779.⁸ Having done so, *Galvez* concludes that

⁷ Again, had the Eighth Circuit's standard been applied here, there could have been no basis for a preemption finding: Petitioner's state law intentional infliction cause of action does not depend upon a finding that AT&T violated the applicable collective bargaining agreement by cleaning out his locker upon his termination, or even that AT&T violated the agreement by the manner in which the Company cleaned out the locker.

⁸ *Galvez* involved a situation in which a supervisor subjected the plaintiff employee both to racial slurs and to being required to work

in the Ninth Circuit, there is *no* § 301 preemption of an intentional infliction tort cause of action where “[t]he employer’s claim revolved around conduct by his employer that is not even arguably sanctioned by the labor contract.” 933 F.2d at 780.⁹

Thus, while the Eighth Circuit will not consider an employer’s anticipated defense of compliance with the collective bargaining agreement at all, the Ninth Circuit makes an anticipatory reading of the collective bargaining agreement to determine whether the employer’s anticipated defense has any realistic chance of success. And, the Sixth Circuit’s substance/manner distinction is apparently of no moment in the Ninth Circuit.

(e) *The Seventh Circuit*: We have left the Seventh Circuit to last since that court, too, has held state intentional infliction of mental distress claims sometimes preempted by § 301 and sometimes not preempted but without making it entirely clear what standard governed in making this distinction. So far as appears from its opinions, however, the line of demarcation in the Seventh Circuit is closest to the Ninth Circuit’s line as fully articulated in the *Galvez v. Kuhn* case just discussed.

Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 137 (7th Cir. 1977), for example, holds

an intentionally speeded-up conveyor belt, making the working conditions physically dangerous.

⁹ Similarly, *Tellez v. Pacific Gas & Elec. Co.*, *supra*, found non-preemption of a claim of emotional distress based upon the employer’s distribution of a defamatory letter because “[t]he collective bargaining agreement does not envision such behavior.” 817 F.2d at 539; *see also Miller v. AT&T Systems*, *supra*, 850 F.2d at 550 n.5 (finding preemption, but distinguishing *Tellez* on this basis).

Again, under the Ninth Circuit’s standard, the Fourth Circuit’s conclusion in this case could not stand: The collective bargaining agreement in this case did not affirmatively “sanction” the discarding of petitioner’s very personal papers in full view of fellow employees; and mere “[c]ompliance with the [collective bargaining agreement] . . . cannot temper the potential outrageousness of the conduct.” *Galvez v. Kuhn*, *supra*, 933 F.2d at 780.

that a state intentional infliction of mental distress claim based upon the use of abusive language by a supervisor is *not* § 301 preempted. The Seventh Circuit reached this conclusion even though the employee's contention was that the incident was part of a campaign to provoke a basis for discharge, and even though the employee could have filed a grievance against the employer to protest the incident. 825 F.2d at 136, 138.

On the other hand, *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989), while explicitly recognizing *Keehr* as good law, 877 F.2d at 571, announced that there is § 301 preemption wherever the "intentional infliction of emotional distress claim consists of allegedly wrongful acts directly related to the terms and conditions of her employment," *id.* at 572, n.10. *Keehr* was different, said the Seventh Circuit, because "the plaintiff's claim 'revolved around conduct by his employer that is not even arguably sanctioned by the labor contract.'" 877 F.2d at 572, *quoting Keehr*, 825 F.2d at 138 n.6.

* * * *

In sum, the various courts of appeal have articulated sharply conflicting standards—and reached irreconcilable results—in the cases concerning whether employees covered by collective bargaining agreements can maintain state law causes of action for intentional infliction of emotional distress against thier employers. And, as the sheer number of cases addressing this issue in the last three years indicates, the issue is one of recurring importance in the federal courts.¹⁰

¹⁰ The above citations do not exhaust the court of appeals cases in which § 301 preemption of intentional infliction claims was at issue; there are other cases, for example, in the First, Fourth, and Ninth Circuits which either repeat the same standards and results or do not reach the merits. And, of course, for each reported court of appeals case there is, in all likelihood, an unreported appellate case and several district court cases, reported and unreported. Indeed, the district court in this case regarded the issue as so routine

(2) The conclusion reached by the Fourth Circuit majority here is not only in conflict with the conclusions reached by other circuits, it is wrong. Section 301 preemption cannot be stretched so far as to defeat an employee's state law claim against his/her employer for intentional infliction of emotional distress where state law, and not the applicable collective bargaining agreement, is alleged to prohibit the employer from acting in that manner.

A labor contract's management rights clause, such as the one relied upon here, simply *maintains* management's state law discretion over certain areas of its business, a discretion that nonunion employers enjoy without regard to any collective bargaining agreement. A management rights clause, in other words, does *not* create any rights the employer does *not* have as a matter of state law. That being so, there is plainly no federalism reason why an employer covered by a management rights clause should be able to exercise this discretion in a manner that, as a matter of state law, is generally considered "outrageous and intolerable", when nothing in the agreement *requires* that the employer so behave.¹¹

To preempt state law intentional infliction causes of action simply because the applicable labor contract does not *forbid* management's actions vindicates *no* federal interest. Such a rule does nothing but provide an unmerited advantage to employers covered by collective bargaining agreements over employers who have no such agreement

that all that was necessary was a bench announcement of the ruling. Pet. App. 35a-39a.

¹¹ This is not to say that the employer should not be permitted to offer its argument that the fact that a labor contract *permits* the challenged behavior demonstrates that the behavior is not sufficiently outrageous to be tortious. That contract-based argument can be decided under federal law, as the dissent in this case shows, without throwing out the plaintiff's state law cause of action in its entirety. See Pet. App. 27a.

by permitting the former but not the latter to exercise their management discretion in an intolerable manner even though the State has determined to forbid *all* employers from so doing.

CONCLUSION

For the reasons state above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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91-515

No.

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,
v.

AT & T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

Petition for a Writ of *Certiorari* to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX TO
PETITION FOR A WRIT OF *CERTIORARI*

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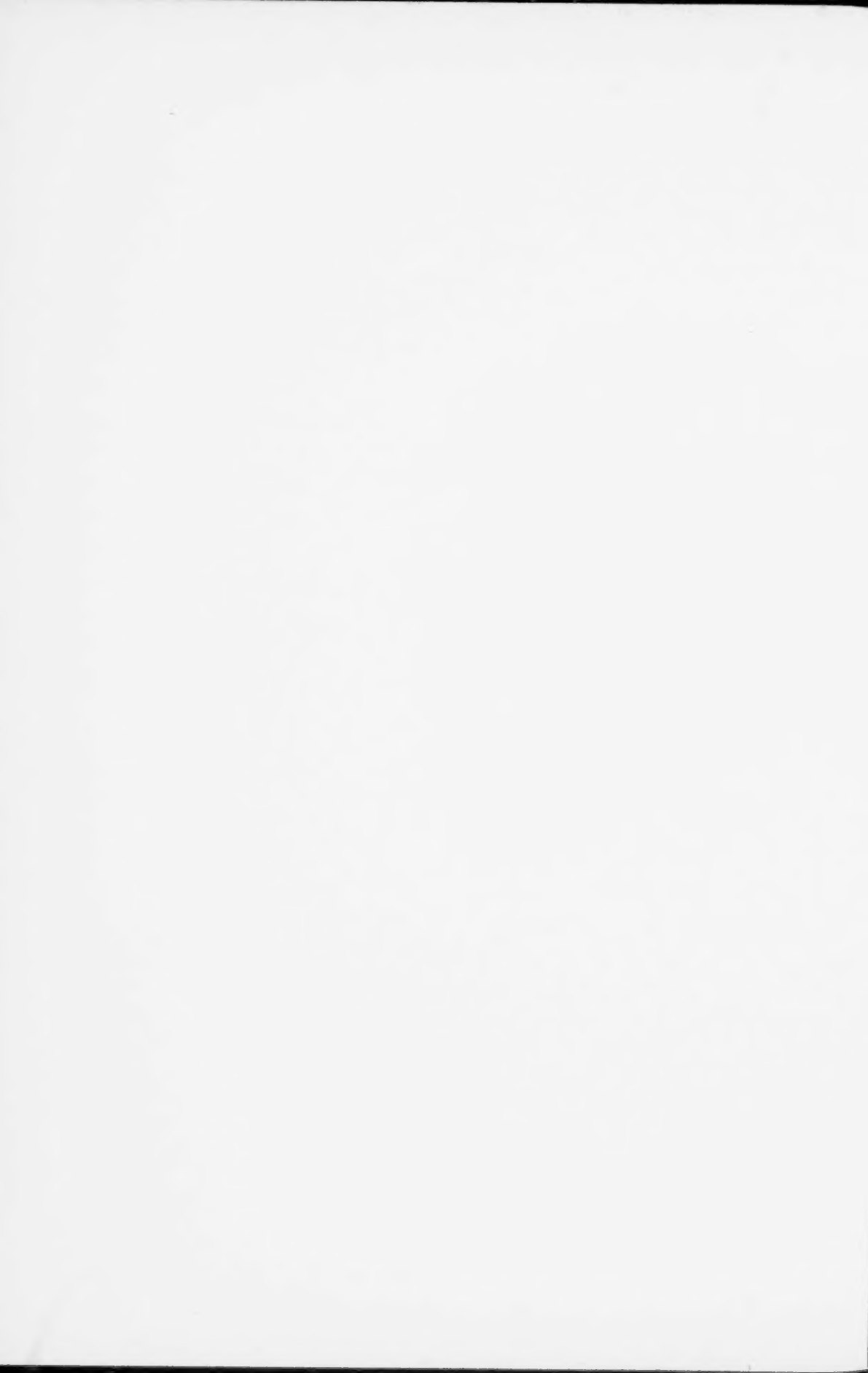


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UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 88-3542

WILLIAM T. MCCORMICK,
Plaintiff-Appellant,
v.

AT & T TECHNOLOGIES, INC.; CAMERON ALLEN,
Defendants-Appellees.

Argued June 5, 1990

Decided May 28, 1991

As Amended June 21, 1991

Thomas Hunt Roberts, Richmond, Va., argued (Malvin W. Brubaker, Richmond, Va., on the brief), for plaintiff-appellant.

Paul Michael Thompson, Hunton & Williams, Richmond, Va., argued (Martin J. Barrington, Hunton & Williams, Richmond, Va., on the brief), for defendants-appellees.

Before RUSSELL, WIDENER, PHILLIPS, MUR-
NAGHAN, SPROUSE, CHAPMAN, and WILKINS, Cir-
cuit Judges, sitting en banc.*

* Judge Wilkinson was a member of the court which heard oral argument in this case, but later recused himself. Judge Niemeyer did not participate in the consideration of this case.

CHAPMAN, Circuit Judge:

The issue presented here is whether an employee's state law claims against his employer for intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, and negligence in the care of a bailment are preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a). The employee's claims arose out of his employer's disposal of the contents of his work locker upon his discharge. The district court ruled that because resolution of the state law claims would require interpretation of the collective bargaining agreement to determine whether the employer was authorized to act as it did, the state law claims were preempted by § 301.

We affirm.

I.

William T. McCormick was employed by AT & T Technologies, Inc. ("AT & T") in Richmond, Virginia, until his discharge in October, 1986. During his employment with AT & T, McCormick was a member of a collective bargaining unit whose exclusive bargaining agent was the Communications Workers of America ("the union"). The terms and conditions of McCormick's employment were governed by a collective bargaining agreement between AT & T and the union. The agreement vested McCormick with numerous rights and benefits including the right to grieve and arbitrate employment disputes.

On September 11, 1986, McCormick left his job at AT & T claiming to be ill. He did not return to work, and on September 26, 1986, AT & T notified him by registered letter that his employment would be terminated if he did not report to work by September 30, 1986. McCormick did not report and AT & T terminated his employment by letter dated October 1, 1986. McCormick's termination was made effective September 22, 1986.

On October 2, 1986, Cameron Allen, McCormick's supervisor at AT & T, was notified of McCormick's termi-

nation. Allen opened McCormick's work locker to remove tools that had been issued him by AT & T. Allen also removed McCormick's personal belongings and discarded them. Allen later was confronted by the union shop steward regarding McCormick's locker. The steward told Allen that other employees had rummaged through the trash and found a personal letter addressed to McCormick. According to the steward, the letter had been read by several of McCormick's co-workers.

On October 3, 1986, McCormick returned to AT & T. During a meeting at which McCormick was represented by a union steward, McCormick offered excuses as to why he had failed to report to work. AT & T decided to void the termination letter, and McCormick returned to his job. Later that day, McCormick reported to AT & T that he had been made the subject of a personal remark related to the letter retrieved from the trash by his co-workers. AT & T transferred McCormick to an area where he could work alone. Nonetheless, McCormick left the building later that evening never to return. AT & T terminated McCormick's employment for job abandonment effective October 3, 1986.

In December, 1987, McCormick filed a complaint in the Circuit Court of Henrico County, Virginia, against AT & T and Allen, alleging that under Virginia tort law the company's actions in disposing of the contents of his locker constituted intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, and negligence in the care of a bailment. AT & T petitioned for removal to federal court pursuant to 28 U.S.C. § 1441 arguing that the federal court had original jurisdiction pursuant to § 301 of the Labor Management Relations Act ("LMRA"). AT & T subsequently moved for summary judgment asserting that McCormick's claims were preempted by § 301 of the LMRA, and that any claims McCormick might have had under § 301 were barred by his failure to exhaust his contractual remedies

and by the applicable statute of limitations. McCormick moved to remand the action to state court and filed a memorandum in opposition to AT & T's summary judgment motion.

On March 29, 1988, the district court denied McCormick's motion to remand. It found that McCormick's state law claims were preempted and therefore properly removed to federal court. The district court granted AT & T's motion for summary judgment because McCormick's claims were time barred by the six-month statute of limitations governing § 301 actions.

McCormick appeals, and we affirm.

II.

McCormick concedes, as he must, that if his state law claims are preempted by § 301 of the LMRA, then the district court acted correctly in granting AT & T's motion for summary judgment. This is so because if the state law claims are preempted, it is plain that the case was properly removed to federal court, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94, 107 S.Ct. 2425, 2430-31, 96 L.Ed.2d 318 (1987); *Arco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560-62, 88 S.Ct. 1235, 1237-38, 20 L.Ed.2d 126 (1968), and that any federal claims McCormick might have had were barred by § 301's six-month statute of limitations, *see DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169, 103 S.Ct. 2281, 2293, 76 L.Ed.2d 476 (1983); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir.1987).

Thus, the only question is whether McCormick's state law claims are preempted by § 301. For the reasons that follow, we hold that his state law claims are indeed preempted.

A.

Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Section 301 not only provides federal courts with jurisdiction over employment disputes covered by collective bargaining agreements, but also directs federal courts to fashion a body of federal common law to resolve such disputes. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206 (1985). Moreover, “the preemptive force of § 301 is so powerful as to displace entirely any state cause of action ‘for violation of contracts between an employer and a labor organization.’” *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983). “State Law is thus ‘pre-empted’ by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective bargaining agreements.” *United Steelworkers of America v. Rawson*, — U.S. —, 110 S.Ct. 1904, 1909, 109 L.Ed.2d 362 (1990).

In *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), the Supreme Court reiterated its test to determine exactly when state laws are preempted by § 301. Consistent with its approach in earlier cases, the Court in *Lingle* emphasized that “state law is pre-empted by § 301 . . . only if such application requires the interpretation of a collective-bargaining agreement.” *Id.* 108 S.Ct. at 1885; *see also* *IBEW, AFL-CIO v. Hechler*, 481 U.S. 851, 863 n. 5, 107

S.Ct. 2161, 2168-69 n. 5, 95 L.Ed.2d 791 (1987) (approving preemption where plaintiff conceded that "[t]he nature and scope of the duty of care owed Plaintiff is determined by reference to the collective bargaining agreement"); *Allis-Chalmers*, 471 U.S. at 220, 105 S.Ct. at 1915-16 (approving preemption if application of state law "substantially depend[s] upon analysis of the terms of an agreement made between the parties in a labor contract"). Thus, the question in preemption analysis is not whether the source of a cause of action is state law, but whether resolution of the cause of action requires interpretation of a collective bargaining agreement. This approach advances § 301's goal of "ensur[ing] uniform interpretation of collective bargaining agreements, and thus . . . promot[ing] the peaceable, consistent resolution of labor-management disputes." *Lingle*, 108 S.Ct. at 1880 (discussing *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962)).

Section 301 does not, however, displace entirely state law in the labor relations context. "[A] State may provide [substantive rights] to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements." *Lingle*, 108 S.Ct. at 1883. The *Lingle* Court made clear that mere parallelism between the facts and issues to be addressed under a state law claim and those to be addressed under § 301 does not render the state-law analysis dependent on the collective bargaining agreement. Thus, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." *Id.*

Following the analysis of the Supreme Court in *Lingle*, we next examine the elements of the state law causes of action advanced by McCormick so that we may determine

whether resolution of his state law claims requires interpretation of the collective bargaining agreement.

B.

McCormick maintains that management actions in disposing of the contents of his locker amount to intentional infliction of emotional distress, negligent infliction of emotional distress, conversion, and negligence in the care of a bailment. Under Virginia tort law, a necessary element of each of McCormick's causes of action is an allegation of some sort of wrongful conduct. The intentional infliction of emotional distress cause of action requires that the defendant's conduct be "outrageous and intolerable." *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). The negligent infliction of emotional distress action requires, obviously enough, that defendant have engaged in negligent conduct. See *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214, 219 (1973). Virginia law defines conversion as "any *wrongful* exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession." *Buckeye Nat'l Bank v. Huff & Cook*, 114 Va. 1, 75 S.E. 769, 772 (1912) (emphasis added). Finally, for negligence in the care of a bailment to exist, defendant must have *negligently* failed in the "duty to account for the thing as the property of another. . . ." *K-B Corp. v. Gallagher*, 218 Va. 381, 237 S.E.2d 183, 185 (1977).

In addition, Virginia follows the general rule that plaintiff bears the burden of demonstrating wrongfulness. "In a negligence action, it is the plaintiff's burden to prove how and why the accident happened." *Hoffner v. Kreh*, 227 Va. 48, 313 S.E.2d 656, 658 (1984). Such wrongfulness cannot be determined in a vacuum. Rather, "[t]he degree of care required . . . varies according to the circumstances of each case." *Holland v. Edelblute*, 179 Va. 685, 20 S.E.2d 506, 507 (1942). "Outrageousness" for purposes of intentional infliction of emotional distress is

also not an independent, nonnegotiable standard of behavior. *Miller v. AT & T Network Systems*, 850 F.2d 543 (9th Cir.1988). Here, as elsewhere, "[t]he conduct of the reasonable person will vary with the situation with which he is confronted." Prosser & Keeton on Torts § 32, at 175 (5th ed. 1984). To prove conduct wrongful, a plaintiff must thus demonstrate not that the conduct was wrongful in some abstract sense, but wrongful under the circumstances.

The circumstances that must be considered in examining management's conduct are not merely factual, but contractual, and the collective bargaining agreement is a crucial component of these circumstances. Cleaning out a locker is not a matter of intrinsic moral import but a question of legal authority—whether management had the lawful right to proceed as it did. The rightness or wrongness of the action has not been committed to the common law of tort, but to the legal arrangements embodied in a contractual agreement, in this case through collective bargaining. State tort claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a "duty of care" exists or to define "the nature and scope of that duty, that is, whether, and to what extent, the [employer's] duty extended to the particular responsibilities alleged by [the employee] in h[is] complaint." *Hechler*, 481 U.S. at 862, 107 S.Ct. at 2168. Whether the actions of management personnel in disposing of the contents of McCormick's locker were in any way wrongful simply cannot be determined without examining the collective bargaining agreement to ascertain the extent of any duty AT & T may have owed him.

Although management's rights and responsibilities regarding employee lockers are not explicitly delineated in the agreement, a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347,

1351, 4 L.Ed.2d 1409 (1960). There are several general provisions in the collective bargaining agreement between AT & T and the union which are relevant to the resolution of employee complaints such as McCormick's. For example, a clause entitled "Management of the Business" states that "[t]he right to manage the business and to direct the working forces and operations of the same, subject to the limitations of this agreement, is exclusively vested in, and retained by, the Company." The agreement also establishes a grievance process to handle all employee disputes "arising with respect to wages, hours of work and other conditions of employment." The agreement specifies that employees have the right to present their complaints either to management or the union, and provides for formal arbitration procedures under which "[a]ny dispute arising between the union and the company with respect to interpretation of any provision of this Agreement or the performance of any obligation hereunder may be referred, during the life of this Agreement, to an arbitrator."

These provisions of the collective bargaining agreement apply generally to the conditions of employment for union employees at AT & T. The issuance of work lockers and tools by the company plainly is among these conditions of employment. The specifics as to management conduct regarding the lockers and tools need not be spelled out in all their detail and refinement for the collective bargaining agreement to be applicable. Rather, the collective bargaining agreement consists, in addition to its express provisions, of an "industrial common law—the practices of the industry and the shop—[which] is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers*, 363 U.S. at 581-82, 80 S.Ct. at 1352. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. . . . [T]he governmental nature of the

collective-bargaining process demand[s] a common law of the shop which implements and furnishes the context of the agreement." *Id.* at 579, 80 S.Ct. at 1351 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv.L.Rev. 1482, 1498-99 (1959)). Thus, the agreement creates in employees and their employers implied rights and duties, the contours of which are a matter "of federal contract interpretation." *AllisChalmers*, 471 U.S. at 215, 105 S.Ct. at 1913. Here, interpretation of the collective bargaining agreement is essential to determine whether and to what extent AT & T owed McCormick a duty concerning his work locker. If management owed him no duty and was entitled under the agreement to dispose of the contents of his locker in the manner it did, its actions *ipso facto* could not have been wrongful under state law.

For example, to determine under Virginia law whether an actor's behavior is "outrageous and intolerable," and therefore punishable as intentional infliction of emotional distress, requires an inquiry into whether the actor was legally entitled to act as he or she did. "The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." Restatement (Second) Torts (1965). If management's actions in disposing of the contents of McCormick's locker were authorized under the collective bargaining agreement, those actions could not simultaneously be considered "outrageous and intolerable" under Virginia law. Thus, "[b]ecause [McCormick's] intentional infliction of emotional distress claim consists of allegedly wrongful acts directly related to the terms and conditions of h[is] employment, resolution of h[is] claim will be substantially dependent on an analysis of the terms of the collective bargaining agreement under which [he] is employed." *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 573 (7th Cir. 1989); see also *Newberry v. Pacific Racing Ass'n*, 854

F.2d 1142, 1149-50 (9th Cir. 1988); *Miller*, 850 F.2d at 551. Accordingly, preemption under § 301 is mandated.

McCormick's three remaining causes of action all arise from the identical incident. Each charges the same management personnel with the same wrongful conduct. Each focuses upon the justification for AT & T management to clean out McCormick's locker as it did. Just as the intentional infliction of emotional distress claim clearly requires interpretation of the collective bargaining agreement to determine whether the alleged conduct was "outrageous and intolerable," so do each of the other charges require recourse to the agreement to determine whether the alleged conduct was "negligent" or "wrongful." "When a court is called upon to decide whether an employer acted reasonably, the possibility that the [collective bargaining agreement] permitted the employer's behavior would strongly support the claim of reasonableness, unless the state had imposed some specific standard disallowing agreements that permit such behavior." *Miller*, 850 F.2d at 549. Management simply could not have acted negligently or wrongfully if it acted in a manner contemplated by the collective bargaining agreement. Thus, just as the necessity of construing the collective bargaining agreement dictates that the intentional infliction tort claim be preempted, so too it dictates that the three associated claims likewise be preempted.

C.

Our holding that McCormick's state law claims are preempted by § 301 is consistent with the holding of the Seventh Circuit in *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir.1989), and the holding of the Ninth Circuit in *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142 (9th Cir.1988). In these cases, both decided post-*Lingle*, the Seventh and Ninth Circuits considered and rejected claims by employees that their state law intentional infliction of emotional distress claims were not preempted by § 301. As the Seventh Circuit stated:

Because [the employee's] intentional infliction of emotional distress claim consists of allegedly wrongful acts directly related to the terms and conditions of her employment, resolution of her claim will be substantially dependent on an analysis of the terms of the collective bargaining agreement under which she is employed. A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement. Therefore, we hold that [the employee's] state-law claim is preempted and must be pursued as a section 301 claim.

Douglas, 877 F.2d at 573; see also *Newberry*, 854 F.2d at 1149-50 ("A determination of the validity of [plaintiff's] emotional distress claim will require us to decide whether her discharge was justified under the terms of the collective bargaining agreement. Her claim therefore cannot be decided without interpreting or analyzing the terms of the agreement. It is therefore preempted . . ."). Moreover, the analysis in both *Douglas* and *Newberry* comports in all respects with the § 301 preemption jurisprudence in the Seventh and Ninth circuits. See, e.g., *Sluder v. United Mine Workers*, 892 F.2d 549 (7th Cir. 1989); *Laws v. Calmat*, 852 F.2d 430 (9th Cir.1988); *Utility Workers v. Southern California Edison Corp.*, 852 F.2d 1083 (9th Cir.1988); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988).

In addition, our holding follows the prior decisions of this circuit in *Willis v. Reynolds Metals Co.*, 840 F.2d 254 (4th Cir. 1988), and *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir.1987). In *Willis* we held preempted an employee's state law privacy, slander, and intentional infliction claims arising out of her employer's investigation of possible employee harassment and its confrontation of the suspected employee. We stated that the state tort claims were preempted because they "purport[ed] to give meaning to the terms of the labor con-

tract." *Willis*, 840 F.2d at 255. Similarly, in *Kirby* we held that an employee's state law invasion of privacy claim arising out of his submission to a search of his person by his employer was preempted because recourse to the collective bargaining agreement was necessary to determine whether the employer was authorized to require such a search. See *Kirby*, 811 F.2d at 155-56. Because resolution of the state law claims in each of these cases required analysis of the collective bargaining agreements, the claims were preempted by § 301. The results in these cases are consistent with the result reached by the Supreme Court in *Lingle*, and the cases therefore retain their vitality after that decision.

There are few workplace quarrels that could not be framed as some form of tortious conduct. Our holding that McCormick's state law claims are preempted by § 301 protects the continued vitality of grievance procedures as a fair and efficient means for the resolution of labor disputes, and it also furthers the uniformity concerns underlying § 301. The Supreme Court has noted that "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103, 82 S.Ct. at 577. In this case, the collective bargaining agreement between AT & T and the union covers employees in several states. To exempt McCormick's claims from preemption would be to invite the courts of these states to give conflicting constructions to the single collective bargaining agreement in determining whether management conduct is wrongful.

III.

For the foregoing reasons, we hold that McCormick's state law tort claims are preempted by § 301 of the Labor Management Relations Act. Any claims he may have had under § 301 are barred by the statute's six-month statute

of limitations. See *DelCostello*, 462 U.S. at 169, 103 S.Ct. at 2293. The judgment of the district court is

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

I disagree fundamentally with the majority's view of the way in which the preemptive effect of § 301 upon state-law tort claims is to be analyzed. Analyzed as I believe the most relevant Supreme Court precedents require, none of the tort claims in issue here—whatever their ultimate merits—is “completely” preempted, *i.e.*, properly “recharacterized” as a federal claim brought under § 301 and therefore subject to removal and then to defenses available against that federal claim. I would hold instead that each of the claims should be remanded to state court to be resolved by state law except to the extent that any defenses raised by the employer-defendant might require interpretation of the collective bargaining agreement, in which case federal labor-contract law should be applied by the state court in assessing those defenses.

I

As indicated, my disagreement with the majority's § 301 preemption analysis is fundamental. And it is a disagreement that simply reflects a wider inter-circuit conflict on this issue that has developed in recent years as the lower federal courts have sought to apply the Supreme Court precedents which, starting in 1985 with *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 165 S.Ct. 1904, 85 L.Ed.2d 206 (1985), and including since then, in succession, *International Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); and *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, — U.S. —, 110 S.Ct.

1904, 109 L.Ed.2d 362 (1990), have addressed the issue of § 301's preemptive force in respect of state-law tort claims brought by individual union employees against their employers or unions alleging injuries growing out of or connected with the employment relationship.¹

Some recapitulation of the principal developments in the evolution of § 301 preemption doctrine is needed to put that issue in context, and to explain the basis for our disagreement upon it in this case.

It all began of course when *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), established that § 301 not only conferred jurisdiction on federal courts to entertain suits for violation of collective bargaining agreements, but also empowered them to develop a uniform body of federal common law respecting the interpretation and enforcement of such agreements. Soon thereafter it was held that state courts retained concurrent jurisdiction over § 301 suits but were to apply (and to participate in the development of) the body of federal common law governing the interpretation and enforcement of labor-contracts recognized in *Lincoln Mills*. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962). And in the same year, the court decided a question reserved in *Lincoln Mills*, that individual employees as well as unions could bring § 301 suits. *Smith v. Evening News Ass'n*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962).

Inevitably then (though § 301 did not expressly say so) it was also quickly held that, by virtue of the Supremacy

¹ These cases unremarkably coincide with the significant erosion during recent years of state-law employment-at-will doctrine and a corresponding more expansive invocation of retaliatory discharge, emotional distress, privacy, and related tort theories in the employment, and other, contexts. See *White, Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 Ala.L.Rev. 377, 390-91 (1990).

Clause, the body of federal common law developed by the federal and state courts in the area covered by § 301, *i.e.*, the interpretation and enforcement of labor-contracts, necessarily displaced any state law concerning such matters. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). And critically, the displacing force of federal law in this area was eventually held to be so powerful as to completely preempt some state-law claims, effectively transforming them into claims arising under federal law. *Arco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (for removal purposes).

The difficult issue, not fully answered in *Arco*, that then emerged was, what kind of state-law claims are thus completely preempted? The most obvious kind was that dealt with in *Arco* itself, a state-law claim alleging—in direct parallel to a federal § 301 claim—violation or breach of a collective bargaining agreement. Because such a claim is completely and only about the interpretation and enforcement of that agreement, it obviously must be treated as “completely preempted” by the perfectly congruent federal claim under § 301. “Complete preemption” in that situation means treating the state claim as one “transformed” into a § 301 federal claim, with all the jurisdictional, substantive and procedural incidents that then attach to such a claim.

The next inevitable question was whether any state-law claims other than those directly alleging breach of a collective bargaining agreement might also be completely preempted. The answer was yes: § 301 preempts some, but not all, state-law tort claims arising out of or connected with the employment relationship. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). This holding was based primarily on the expressed concern that to limit complete preemption to formally alleged breach of contract claims would “elevate form over substance and allow parties to evade the re-

quirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.” *Id.* at 211, 105 S.Ct. at 1911.

Yet the Court was careful to avoid holding, as presumably it might have, that any state tort claim arising out of or connected with the employment relationship must—to avoid manipulation by artful litigation tactics—be found completely preempted. *See id.* at 211-12, 105 S.Ct. at 1911 (“not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law”); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n. 28, 103 S.Ct. 2841, 2854 n. 28, 77 L.Ed.2d 420 (1983) (“[E]ven under § 301 we have never intimated that any action merely relating to a contract within the coverage of § 301 arises exclusively under that section.”). Instead, complete preemption of employment-related state tort claims was to be limited to those whose “evaluation . . . is inextricably intertwined with consideration of the terms of the labor contract,” as opposed to being “independent of any right established by contract.” *Lueck*, 471 U.S. at 213, 105 S.Ct. at 1912. Or, as the Court put it in an alternative formulation, complete preemption occurs only “when resolution of a state-law claim is substantially dependent upon analysis of the terms of a [collective bargaining agreement].” *Id.* at 220, 105 S.Ct. at 1916.

Lueck found the claim there in issue completely preempted under its “independent-or-inextricably-intertwined/substantially dependent” test. Though pleaded as a state-law tort claim for bad faith handling by the employer of the plaintiff-employee’s claim for insurance benefits under the employer’s fully funded benefit plan, it was manifest from the claim as pleaded that the “tort” duty alleged could only have arisen from the collective bargaining agreement which both provided the insurance bene-

fits and prescribed the claims process. Because the evaluation of such a claim would therefore be "inextricably intertwined with consideration of the terms of the labor contract," it was completely preempted. *Id.* at 213, 216-20, 105 S.Ct. at 1912, 1913-16.

This relatively easy application of the test of complete preemption soon was followed by an equally easy one in *Hechler*, 481 U.S. 851, 107 S.Ct. at 2161. There, considering a state-law claim pleaded as one of negligent failure of a union to provide a safe workplace for the plaintiff-union member, the Court, following its *Lueck* analysis, held that it was manifest from the complaint, because expressly pleaded by the plaintiff, that the union's duty of care only arose from "contracts and agreements" between union and employer, so that the claim was completely preempted. *Id.* at 859-62, 107 S.Ct. at 2166-68.

The next critical development came in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). In that case, the Court, analyzing an assertion of complete preemption for removal purposes, emphasized important limits on the extent to which defendants' preemption defenses as opposed to plaintiffs' claims were to be considered in deciding complete preemption questions. The case involved state-law claims brought by plaintiffs who over time had been both union and non-union employees. They claimed that in terminating them their employer had breached individual contracts formed while they were not members of the union. The employer sought removal on the basis that the claims were completely preempted because the individual contracts had been "superseded," as a matter of federal labor-contract law, by collective bargaining agreements.

Not so, said the Court. Analyzing the preemption question as a jurisdictional one and addressing it in light of the "wellpleaded complaint" rule and its "independent corollary," the complete preemption doctrine, the Court found the claim not completely preempted and removal

therefore improper. The claims were not "substantially dependent" upon interpretation of the collective bargaining agreement. As pleaded, they relied entirely on the plaintiff's individual contracts as the source of allegedly violated rights, rather than on the collective bargaining agreement, nor did they draw in issue any relationship between the two. *Id.* at 394-95, 107 S.Ct. at 2430-31. The defendant's attempt to insert the collective bargaining agreement as a matter of defense could not create a basis for complete preemption; that was to be determined by the claim as pleaded, not as it might have been pleaded. *Id.* at 397, 107 S.Ct. at 2432. In sum, the Court noted, "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Id.* at 399, 107 S.Ct. at 2433 (emphasis in original). In such a situation, the state-law claim remains just that and must be remanded. Upon remand, the state court might consider any federal defenses based on the collective bargaining agreement and for that limited purpose might interpret the agreement as a matter of federal law. *See id.* at 398, 107 S.Ct. at 2432-33.

Notwithstanding *Caterpillar's* emphasis on the absolute primacy of the nature of claims over defenses in assessing whether a state-law claim was completely preempted, difficulties in application of the test continued in the lower courts. The problem, in general, was probably traceable to an over-emphasis on the "inextricably intertwined" concept and a failure to appreciate the intended meaning of the "independent" concept in the test first formulated in *Lueck*. In any event, that was the problem that was faced in the Supreme Court's next consideration of the complete preemption issue. In *Lingle*, 486 U.S. 399, 108 S.Ct. 1877, the issue was whether a state-law tort claim of retaliatory discharge in violation of a state statute was completely preempted by § 301. The court of appeals had

held that it was, believing that evaluation of the state-law claim would be “‘inextricably intertwined’” with the collective bargaining agreement because “‘the same analysis of the facts’” would be required in processing a grievance claim under the collective bargaining agreement and in a state civil action challenging the discharge. *Id.* at 402, 108 S.Ct. at 1879, quoting *Lingle v. Norge Div. of Magic Chef*, 823 F.2d 1031, 1046 (7th Cir.1987) (en banc).

The Supreme Court reversed, finding the claim not preempted under the test evolved through *Lucas Flour*, *Lueck*, *Hechler*, and *Caterpillar*. Looking to the black-letter elements of the state tort claim, as pleaded, to determine whether its resolution required construction of the collective bargaining agreement, *see id.* 486 U.S. at 406-07, 108 S.Ct. at 1881-82, the Court concluded that it did not. The question whether the discharge was or was not retaliatory was purely a factual one turning on the employer's motivation; its resolution would not require interpretation of any term of a collective bargaining agreement, even if the non-retaliatory reason asserted by the employer were one identified as “good cause” in the agreement. *Id.* at 407-08, 108 S.Ct. at 1882-83. The fact that evaluation of the state-law claim might require attention to the same facts as those evaluated in a “good cause” grievance procedure under the labor contract was irrelevant to the preemption inquiry. Such parallelism alone did not negate the “independence” of the state claim in the only sense that mattered for § 301 preemption purposes: that resolution of the claim did not require construction of the labor-contract. *Id.* at 409-10, 108 S.Ct. at 1883-84.

In holding the claim not completely preempted, the *Lingle* Court observed in an important aside that such a holding did not mean that issues requiring interpretation of the collective bargaining agreement might not remain for resolution by the state court on remand. In such a

case, "although federal law would govern interpretation of the agreement . . . the underlying state-law claim, not otherwise pre-empted, would stand." *Id.* at 413 n. 12, 108 S.Ct. at 1885 n. 12.

The final development to date involves the Supreme Court's application of the *Lueck-Hechler-Caterpillar* test, as clarified in *Lingle*, in *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, — U.S. —, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990). In that case, survivors of union miners killed in a mine accident brought a state-law wrongful death action against the miners' union in state court. The complaint alleged, as the proximate cause of the accident causing deaths, fraud and negligence by the union's representatives in conducting mine safety inspections pursuant to a collective bargaining agreement.

The case posed a particularly difficult conceptual problem for application of the *Lueck-Caterpillar-Lingle* complete preemption test, a difficulty that in fact led to the first division within the Court in any of its line of cases dealing with § 301 preemption of employment-related state tort claims. In applying *Lingle's* analytical framework which centers on the elements of the claim as advanced by plaintiff to determine its "independence," the special difficulty arose from the two different ways in which the claim could be viewed. The majority held in the end that because the claim, as originally pleaded and developed through discovery and summary judgment proceedings, located the duty allegedly breached by the union in the collective bargaining agreement, it was completely preempted, in the same way and for the same reasons that the claims in *Lueck* and *Hechler* were. *Id.* 110 S.Ct. at 1909-11.

But there was another way of looking at the claim. As eventually structured by the plaintiffs (undoubtedly now educated to the perils flowing from their original location of the duty's source in the collective bargaining agreement) it located the duty's source in the union's

having undertaken, for whatever reason, to perform safety inspections. This invoked a respectable common law theory of tort liability which finds duty simply in the actual undertaking of duty, and does not look behind its undertaking. See *Restatement (Second) of Torts* § 323. This was indeed the theory actually accepted by the state's highest court in finding the claim not preempted under the *Lingle* analysis, and for exactly the reasons that the *Lingle* claim of retaliatory discharge was held not preempted. A minority of the Supreme Court thought this the right view to take of the claim—largely because the state's highest court had so interpreted it under state law—and would have held it not preempted under the *Lingle* analysis. *Id.* 110 S.Ct. at 1913-15 (Kennedy, J., dissenting).

III

I have run rather laboriously through this familiar line of cases because I believe the exercise necessary to demonstrate why, in my view, the majority's preemption analysis (and that of some other courts) is flawed, and probably where it got off track.

The run-through takes us back to the origins of § 301 complete preemption doctrine—in § 301 itself—and illustrates a consistent, unvarying approach by the Supreme Court to keep the scope of this particular preemption of state-law claims properly confined to that statutory source.

Section 301(a) only authorizes suits in federal court (by union-employees or their unions) "for violation of [labor] contracts"; it does not authorize suits in federal court to enforce any claim by a union-employee against his employer or union that arises out of or is connected with his employment relationship, or that somehow touches on matters that might be the subject of labor-contract terms. 29 U.S.C. § 185(a). The limited scope of the federal claims authorized, hence made subject to federal law, by § 301(a), dictates a comparably limited scope for

the preemptive force of that statute. It obviously preempts state-law claims formally alleging violations of labor contracts—the exact and only kind expressly made federal ones by § 301. Beyond those, it only preempts, as a matter of judicial interpretation, state-law claims that can be determined to be claims for violation of labor contracts in substance though not in form, and those only out of the felt necessity that parties not be allowed “to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.” *Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911.

This is the true principle that underlines the Supreme Court’s various formulations focussing on whether the state-law claim is “independent” of any labor contract or, instead, is one whose “evaluation . . . is inextricably intertwined with consideration of the terms of the labor contract” or “is substantially dependent upon analysis of [such] terms.” *Id.* at 213, 220, 105 S.Ct. at 1912, 1915-16. Each of these formulations is designed to focus inquiry on the only way in which a state-law claim that is not formally cast as one for breach of a labor contract can nevertheless be found to be one in substantive effect, so that it also is preempted by § 301.

This basic principle consistently has informed both the rationale and the result in each of the Supreme Court’s § 301 preemption cases. Where the claim has been determined to be one for violation of a labor contract in substance though not in form, preemption has resulted, *see Lueck, Hechler, Rawson*; where it has been determined not to be such, preemption has not resulted, *see Caterpillar, Lingle*. The analytical technique used by the Court in determining whether the claim was actually one for violation of a labor contract in disguise or in substantive effect, has been to focus on where the claimant has located the duty allegedly breached by the employer or union-defendant. Where, though advanced as a tort or otherwise “independent” claim, it has been apparent

that the duty allegedly violated could *only* have been created by the labor contract, preemption has resulted, *Lueck* (employer's contractual duty to process insurance claims); *Hechler* (union's contractual duty to provide safe workplace); *Rawson* (union's contractual duty to make safety inspections); where the duty allegedly violated has plausibly been located "independently" of any labor contract, in general tort law or elsewhere, preemption has not resulted, *Caterpillar* (employer's duty under individual employee contracts); *Lingle* (employer's general statutory duty not to discharge retaliatorily).

Important in this analytical approach has been the Court's steadfast concentration on the nature of the claim advanced rather than any defense put forward as determinative of the dispositive duty-location issue—for the very good reason that a defendant's defensive positions are irrelevant to the issue whether a plaintiff's claim is, in form or substance, one for violation of a labor contract, see *Caterpillar*, 482 U.S. at 398-99, 107 S.Ct. at 2432-33.²

² A passage in the *Lingle* opinion may seem to draw this proposition in question, and might well be one of the causes for continued disagreement on this point among the lower courts.

In analyzing the Illinois tort of retaliatory discharge, the Court not only noted that proving the elements of the claim would present "purely factual questions" that would not "require[] a court to interpret any terms of a collective-bargaining agreement," but that the "purely factual inquiry" prompted by a defense of a non-retaliatory reason "likewise does not turn on the meaning of any provision of a collective-bargaining agreement." *Lingle*, 486 U.S. at 407, 108 S.Ct. at 1882.

This obviously may be read—as some courts surely have read it—to imply that preemption can turn on the nature of a defense grounded in a labor contract, as well as on the nature of a plaintiff's claim. If this were considered a holding of the case, it concededly would pose real problems for the position taken in this dissenting opinion. With all respect, I suggest that it may not be so considered—for three reasons.

First, if it were read as a flat holding that a federal defense (conduct justified by provisions of a labor contract) could transform a well-pleaded state-law claim into a federal action arising under

Or, returning again to the preemption source, for the very good reason that § 301 simply does not federalize all union or union-employee claims to which an employer-defendant interposes a defense based on the terms of a labor contract.³

§ 301, it would directly contradict the flat holding to the contrary in *Caterpillar*. See *id.* 482 U.S. at 398-99, 107 S.Ct. at 2432-33 (even federal defense of waiver by labor contract does not transform action into one arising under federal law; defense is one for resolution by state court on remand). *Lingle* does not purport to overrule or to question *Caterpillar*, but indeed expressly recognized that earlier decision's continued authority. See *Lingle*, 486 U.S. at 410 n. 10, 108 S.Ct. at 1883-84 n. 10. This suggests that the passage was not intended as a holding and should not be so considered.

Second, in context, the *Lingle* Court's reference to the nature of the non-retaliatory reason defense is best read as "even if" dicta in relation to the preemption issue. The thrust of the Court's discussion at that point is that litigation of this particular retaliatory discharge action necessarily will turn on the issue of employer motivation; that this is purely factual in whatever of its dimensions the case is viewed; that accordingly there is no prospect that any terms of the labor contract will require interpretation even if employer defense as well as employee claim were taken into account.

Finally, no other decision in the line of Supreme Court cases even intimates that in making the preemption analysis—whether for removal or substantive defense purposes—it is appropriate to inquire whether resolution of a defense will require interpretation of a labor contract. *Lingle* therefore may only be harmonized—as an intermediate decision in the line—by treating the passage as dicta.

³ Indeed, in conducting a proper § 301 preemption analysis, the terms of a labor contract raised as the basis of a preemption defense to a state-law tort claim need be looked to by the court only in quite limited circumstances and for a quite limited purpose. Where the tort theory invoked, though general in its reach, has a duty element that necessarily is based on a contractual relationship, the labor contract is appropriately inspected to see if it supplies the specific contractual duty in the case at hand. This, as noted in *Lingle*, 486 U.S. at 405, 108 S.Ct. at 1881, was the situation presented in *Lueck*, where the tort claim for negligent processing of an insurance claim necessarily implied an insurance-contract relationship between the parties. 471 U.S. at 213-16, 105 S.Ct. at 1912-14. The labor contract was appropriately looked to to confirm that it did indeed include insured-insurer provisions.

Where the preemption issue is raised jurisdictionally as a basis for removal, the Court's concentration on the dispositive nature of the claim is realized through application of the well pleaded complaint rule, *see Caterpillar*, 482 U.S. at 392-93, 107 S.Ct. at 2429-30, but the same claim-centered analysis is followed where preemption has been raised and is addressed as a defense on the merits, *see, e.g., Rawson* (§ 301 preemption raised and litigated as federal defense in state court action).

If this be an accurate assessment of the right way—because it is the Supreme Court's way—to analyze a § 301 complete preemption issue, it is obvious that the majority here, and some other courts, have gotten off the track. Of course I think they have, and I venture the following possible explanation.

Where they have strayed is in looking beyond the plaintiffs' claims to the merits of defendants' § 301 preemption positions (whether raised as a jurisdictional basis for removal of, or as a substantive defense to, a state-law claim) to determine whether the claim is completely preempted. As indicated, this approach has been rigorously avoided, and indeed positively rejected, by the Supreme Court. When courts nevertheless follow it, as does the majority here, they are led to ask the irrelevant question whether "evaluation" of the total *action* (claims and defenses), rather than of the claim alone, will be "inextricably intertwined with consideration of the terms of the labor contract." And where, as in this case for example, an employer asserts defensively that the legal justification for its allegedly tortious conduct is found in a labor contract, a court looking to both claims and defenses obviously will answer yes, and find preemption.

I think the Supreme Court precedents demonstrate that this is an incorrect approach. What it seems to miss is that the mere fact that the need for some interpretation of a labor contract's terms may appear inevitable, based upon the issues joined by the parties (whether by re-

moval petition or by answer on the merits), does not of itself demonstrate that the claim is completely preempted. As demonstrated by all the Supreme Court's later decisions, that is not what is implied by the "inextricably-intertwined/substantially dependent" formulations in the original *Lueck* test.

In any event, whatever may be the exact basis of the majority's view here and of the nature of our disagreement upon the matter, I think the Supreme Court precedents above reviewed establish the following critical rules for determining whether a state-law tort claim is completely preempted by § 301.

1. The primary rule is that whether such a claim is preempted depends entirely upon whether the claim, as defined by state law and as specifically advanced by the claimant, locates the "tort" duty allegedly violated by a defendant in the terms of a labor contract or in some other source independent of any such contract.

2. In determining whether a claim locates an alleged tort duty in a labor contract or in another source, a defendant's assertions (whether for removal purposes or as a defense on the merits) that a labor contract's terms provide either a negating or affirmative defense to the claim are irrelevant to the preemption issue.

3. When, as in this case, the preemption issue is raised as a basis for removal of a state-court action to federal court, the above rules are applied as special cases of the "well-pleaded complaint" rule for purposes of determining federal jurisdiction.

4. Upon a determination under the above rules that a statelaw claim is not completely preempted, the *action* is to be resolved under state law, except to the extent that its ultimate resolution requires interpretation of a labor contract's terms, in which event federal law controls the interpretation. Such a resolution may be by a

state court, either on remand from federal removal or following its own determination of non-preemption.

IV

Applying these rules to the various claims advanced by plaintiff here, I would, as indicated, find none preempted by § 301, and would therefore remand all to state court for resolution in accordance with this opinion.

A

I first consider the intentional infliction of emotional distress claim.

The majority, following the approach I have earlier criticized, essentially finds this claim preempted because, in common with all the other claims, its proof necessarily will require proof of "wrongful conduct" by the employer. From this, the reasoning proceeds that inevitably this will require proof of all the circumstances relevant to the conduct's occurrence; that one of these circumstances will be the labor contract between the parties; that this will require interpretation of that contract, and that that does it: the claim is preempted. Op. 535-536. The majority then proceeds to demonstrate in considerable detail how various provisions of the labor contract may bear upon the ultimate factual issue of whether AT & T's conduct was "outrageous" or instead completely reasonable in light of the contract. *Id.* at 536-537.

This analysis of how litigation of this claim in a civil action probably would proceed is likely an accurate one, but in my view it is irrelevant to the much simpler, true preemption issue: whether McCormick's well-pleaded state-law tort claim locates the duty allegedly violated by AT & T in their labor contract or in some source of legal duty independent of that contract. The answer to that issue is plain: in an independent source, Virginia tort law. Specifically, in the duty imposed by that body

of law upon all persons, running to society in general and not dependent upon any employment relationships, (1) not to engage in intentional or reckless conduct (2) that is outrageous and intolerable, offending generally accepted standards of decency, and (3) that causes (4) severe emotional distress to a plaintiff. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145, 148 (1974). McCormick's claim obviously does not seek to locate any such duty, either expressly or by necessary implication, in any special obligation imposed on AT & T by its labor contract, as did the preempted claims, for example, in *Lueck*, *Hechler*, and *Rawson*.

The fact that in defending against the claims in a civil action AT & T may be entitled (though this is not a sure thing) to rely on provisions of its labor contract to demonstrate that its conduct in conformity with them could not be considered "outrageous" is at this point in the process beside the point. That would be to invoke a federal defense (the labor contract's terms) and such defenses cannot transform McCormick's well-pleaded state-law tort claim into a federal claim under § 301. *See Caterpillar*, 482 U.S. at 399, 107 S.Ct. at 2433. If such a federal defense is offered and admitted at trial, it may be resolved by the state court on remand, applying federal labor contract law if needed to interpret any terms of the contract. *See id.* at 397, 398 n. 13, 107 S.Ct. at 2432, 2433 n. 13; *Lingle*, 486 U.S. at 413 n. 12, 108 S.Ct. at 1885 n. 12.⁴

⁴ The majority properly notes that its analysis finding preemption of the intentional infliction of emotional distress claim is in accord with those of the Ninth and Seventh Circuits. *See op.* at 537. The Fifth Circuit also recently held that § 301 preempted an intentional infliction of emotional distress claim. *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250 (5th Cir. 1990).

It should be noted here that the Third and Sixth Circuits agree with the view expressed in this dissent that such claims are not preempted. *See Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3d Cir. 1990); *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989).

The Eighth Circuit has ruled both ways on intentional infliction of emotional distress claims. *Compare Hanks v. General Motors*

B

Exactly the same analysis applies to the claim of negligent infliction of emotional distress.

Here again, the majority rests its preemption determination on the ground that to prove this claim McCormick must prove that AT & T's conduct was wrongful; that whether it was wrongful will depend on the circumstances; that one of the circumstances inevitably will be any terms of the labor contract relevant to the conduct; and that this will require interpretation of the contract.

Here again, this analysis simply misapplies the relevant test. Rightly applied, that test would find that McCormick's "wellpleaded" complaint located the duty allegedly violated by AT & T not in any terms of its labor contract but in Virginia's general tort law.

C

The conversion and negligent bailment claims present only slightly different problems for application of the proper preemption test, and its application to each also demonstrates nonpreemption.

(1)

McCormick's conversion claim invoked Virginia's common law remedy for that tort, which is defined as "'any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession.'" *Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 92 S.E.2d 359, 365 (1956) quoting *Buckeye Nat'l Bank v. Huff & Cook*, 114 Va. 1, 75 S.E. 769, 772 (1912). As specifically pleaded, the claim is effectively one that at some point in the process of

Corp., 906 F.2d 341 (8th Cir. 1990) (emotional distress claim not preempted) with *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989) (emotional distress claim preempted).

removing his personal effects from his locker and then disposing of them, AT & T agents "wrongfully exercised or assumed authority over his goods, depriving him of their possession." *See id.* As such, this is a well-pleaded state law conversion claim which does not, as did the claims in *Lueck*, *Hechler*, and *Rawson*, locate the tort duty allegedly violated in a labor contract. Instead, it located it, independently of any contract, in the general duty owed by all persons under Virginia law not to convert *any* other person's property. That the labor contract may, as AT & T asserts defensively, have much to say about the way in which employees' lockered property may be handled by the employer upon separation, and may even provide a defense to the conversion claim here, is irrelevant to the preemption inquiry. -As in the case of the claims for infliction of emotional distress, this would be a matter of federal defense to be determined under federal law governing the interpretation of labor contracts, but as a defense it could not have the effect of transforming the state-law claim into one under § 301.

(2)

The claim of bailee-negligence, rightly analyzed, yields the same result, non-preemption.

McCormick's well-pleaded claim here invokes the Virginia common law rule that one who comes into lawful possession of another's property and exercises control over it, thereby becomes a bailee of the property, with a duty to account for it to the bailor. Under Virginia law, "it is the element of lawful possession, however created, and duty to account . . . that creates the bailment, regardless of whether or not such possession is based on contract in the ordinary sense.'" *Morris v. Hamilton*, 225 Va. 372, 302 S.E.2d 51, 52 (1983), quoting *K-B Corp. v. Gallagher*, 218 Va. 381, 237 S.E.2d 183, 185 (1977).

Here McCormick's specific claim, as pleaded, was that after AT & T's representative came into lawful possession of his property, she thereafter failed negligently to account for the property as was her duty. J.A. 13. In the clearest possible way, this claim does not locate the duty allegedly violated in the labor contract, but that the duty imposed by general Virginia law upon anyone exercising lawful possession, "*however created*," over another's property. Indeed, to the extent this claim makes even an implicit reference to any legal effect flowing from the labor contract, is to concede by the allegation of AT & T's originally *lawful* possession that the duty to account as bailee did not arise from any preexisting contractual relationship.

Because this claim, as do the others, locates the tort duty allegedly violated in a body of tort law independent of any labor contract, it should be found not preempted.

V

It cannot be gainsaid that to find employment-related statelaw tort claims not preempted by § 301 has the effect of diverting from arbitration some workplace disputes that could be—and from the standpoint of national labor policy, might better be—grieved and resolved by that preferred means. And, to a less certain extent, it cannot be gainsaid that the goal of national uniformity in labor law is thereby threatened.⁵ Some commentators have

⁵ I say to a lesser extent for two reasons. First, because state courts, like federal, are bound to apply federal law in their interpretations of labor contracts. While it may be supported by some that they could be less "expert" in their applications of uniform federal law, it cannot be supposed by any that they will be less faithful in the effort. Second, and more critically, because it is difficult to see how there will be much true "contract interpretation" in adjudicating state-law tort claims to which various terms of labor contracts may have some evidentiary relevance as defenses. For the most part, the relevance of such terms would seem to be confined to offering plausible factual alternatives to the motiva-

deplored these twin consequences of non-preemption and urged as an antidote an expansive judicial view of § 301's preemptive scope.⁶ And some courts undoubtedly have been influenced by these policy concerns in adopting the expansive views of preemption with which this dissenting opinion disagrees. The majority here expressly alludes to both. Slip op. 15.

I conclude with an observation about those policy concerns.

The preemption policy at issue is a matter for Congress and not for the courts. The basic policy decision against which some now chafe because of concerns about threats to arbitration and uniformity of labor law, was made by Congress when it deliberately chose the critical federalizing prescription, "violation of [labor] contract," in § 301(a).

tional basis for particular employer or union conduct. See *Lingle*, 486 U.S. at 407, 108 S.Ct. at 1882 (pointing out primarily factual context of litigation concerning employer's alleged retaliatory discharge of employee).

⁶ See *supra* note 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 88-0005-R

WILLIAM T. MCCORMICK,
Plaintiff,
v.

AT&T TECHNOLOGIES, INC., and CAMERON ALLEN,
Defendants.

ORDER

[Filed Mar. 29, 1988]

For the reasons stated from the bench and deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

Plaintiff's Motion to Remand be and the same is hereby DENIED; Summary Judgment is herewith entered in favor of the defendants, and this cause stands dismissed.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Court

Date 29 Mar. 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CA 88 0005 R

WILLIAM T. MCCORMICK,
Plaintiff,

v.

AT&T TECHNOLOGIES, INC.,
Defendant.

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AS STATED FROM THE BENCH

March 29, 1988
Richmond, Virginia

THE COURT: All right. You did the best you could with your briefing. It is over. Thank you. The matter comes before the court on the plaintiff's motion to remand this case to the state court, and the cross motion of the defendant for summary judgment.

It seems to me that disposing of each of these motions turns on the same inquiry, and that is whether the plaintiff's alleged state law claims are pre-empted by section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. In support of the motion for summary judgment is an affidavit. The undisputed facts as the court sees them are that plaintiff is a former employee of AT&T Technologies, Inc. who filed an action in Henrico Circuit Court for alleged negligent infliction of emotional distress, intentional infliction of emotional distress, conversion and negligence.

The gravamen of the complaint is that one Allen, an employee of AT&T, cleaned out plaintiff's company locker and that some co-employees read certain of plaintiff's personal correspondence as a result.

Due to absenteeism problems, AT&T by letter dated October 1, 1986 terminated plaintiff's employment as of September 22, 1986. Memorandums, and I think primarily in memorandums, reflect that he had been absent for some time prior to that, but that was the date that they used, I think, because the file would reflect that he had been called on that date and said he would be in the next day, something of that nature. On October 2, 1986 Ms Allen opened the locker which AT&T had issued to plaintiff, and removed company tools.

Allen placed in a trash receptacle certain other items found in the locker, under the apparently erroneous assumption that they were trash. Plaintiff alleges that these items were of sentimental value and included personal correspondence, which was retrieved, read, and disseminated by some of his co-employees.

On October 3rd, AT&T rescinded the discharge which had been issued October 1 and restored plaintiff to em-

ployment subject to discipline for excessive absenteeism. Later that same day plaintiff left the premises and was terminated effective October 3. The rescission can't mean anything but a voiding of the previous letter. And this action was filed in state court in December of 1987 and removed to this court by the defendants in January of 1988. The plaintiff contends that the case must be remanded to the state court because this court allegedly lacks subject matter jurisdiction necessary for removal, 28 U.S.C. section 1441, 1447 (c). It is plaintiff's contention he was not an employee on October 2, that state law claims are therefore not pre-empted by section 301, and that this action is not one over which the federal courts have original jurisdiction, 28 U.S.C. section 1441.

Defendants, on the other hand, contend that because the October 1 termination was rescinded, plaintiff was an employee on October 2, that any complaints about the defendants' alleged actions therefore arise under the collective bargaining agreement in effect, and that the collective bargaining does provide for grievance procedures. The company had the right to manage their business and direct the working forces and operations of the same. There isn't any doubt they had the right to clean out that locker.

It is the position of the defendants that plaintiff should have pursued the grievance process as provided in the agreement. In that event federal question jurisdiction would be appropriate under section 301 of the Labor Management Act. Defendants contend summary judgment is appropriate because of plaintiff's failure to file an action within the six-month statute of limitations applicable to section 301. The plaintiff very frankly admits that if defendants are correct in the first contention, then they are correct in this one.

The law in the Fourth Circuit is clear. That where a plaintiff asserts claims under state law that rely upon duties or relationships defined by a labor contract, state tort or contract claims are pre-empted by section 301 of the Act. See *Willis v. Reynolds Metals Co.*, No. 87-3597

(4th Cir. 1988); Kirby v. Allegheny Beverage Corporation, 811 F.2d 253 (4th Cir. 1987). Where the claim arises out of a relationship governed by a labor contract, the complaint will be deemed to arise under federal labor law regardless of the artful pleading of state law. Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 1983. State law claims which purport to define the meaning of or require analysis of a labor contract are pre-empted by the broad pre-emptive reach of section 301. Allis Chalmers v. Luck, 471 U.S. 202, (1985), and are properly removed to the federal court.

Where a state law claim is deemed pre-empted by section 301, and the case is properly removed to the District Court, the court must apply the six-month statute of limitations extended to 301 claims by the Supreme Court in *Delcostello v. Teamsters*, 462 U.S. 151 (1983), Kirby v. Allegheny, *supra*.

In the instant case 14 months passed between the time Allen emptied the locker and the filing of plaintiff's action. To the extent that the claim is pre-empted by 301, it is accordingly barred by the statute of limitations. Plaintiff contends that although the alleged torts were committed by a former employee on the employer's premises, the claims do not rely on or arise from a collective bargaining agreement. He contends that he was discharged on October 1, and was thereafter not an employee until the discharge was rescinded on October 3.

Plaintiff reasons that he was not an employee on October 2, and his claims are thereafter not pre-empted. I don't think the plaintiff's arguments are well taken.

It is undisputed that the plaintiff's October 1 discharge was rescinded. Plaintiff was not simply rehired, but rather the initial discharge was annulled, declared to be void, and the employment relation continued as if the discharge of October 1 had never occurred. It was not until October 3 that plaintiff's employment ended by his walking off the job.

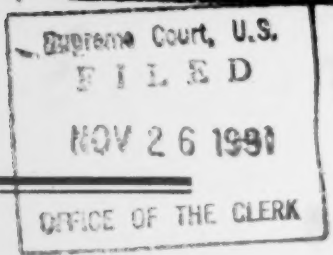
Because the claims arise from conditions of employment governed by a collective bargaining agreement they are, in the courts view, pre-empted by section 301. Removal of this case was appropriate.

And plaintiff's action was filed long after the running of the six-month statute of limitations, as admitted by the plaintiff. It is accordingly barred. The motion to remand is denied. Summary judgment is entered for the defendants.

Thank you gentlemen, for your help in this case.

(3)

No. 91-515



IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,

v.

AT&T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that petitioner's state law claims—arising out of his employer's treatment of a work locker on its premises—could not be resolved without interpreting the applicable collective bargaining agreement and therefore had to be treated as claims arising under § 301 of the Labor Management Relations Act?

STATEMENT REQUIRED BY RULE 29.1

AT&T Technologies, Inc. was merged into the American Telephone and Telegraph Company ("AT&T"), effective December 31, 1989. AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests, either directly or through wholly-owned subsidiaries, in the following companies that have publicly-traded securities: Compagnie Industriale Riunite S.P.A., AT&T Capital Corporation, and AT&T Credit Corporation.

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WILLIAM T. MCCORMICK,
v. *Petitioner,*

AT&T TECHNOLOGIES, INC. and CAMERON ALLEN,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case presents neither the questions nor the conflicts that the Petition alleges. A former bargaining unit employee of AT&T here claims that AT&T committed Virginia state law torts of conversion, negligence, and intentional or negligent infliction of emotional distress by entering a work locker and disposing of materials left there after the employee abandoned his job. The Fourth Circuit held that these claims "required interpretation of the applicable collective bargaining agreement" (Pet. App. 6a-7a, 10a), and thus that they had to be treated as arising under § 301 of the Labor Management Relations Act ("LMRA") under a long line of decisions of this Court.

There is no conflict in the courts of appeals over the applicable legal standard. Nor is there even a conflict in the courts of appeals over the manner in which this legal standard is to be applied to claims like petitioner's. Petitioner argues otherwise by misstating both the Fourth Circuit's holding and the holdings of other courts of appeals.

1. Petitioner William T. McCormick is a former bargaining unit employee of respondent AT&T Technologies, Inc. ("AT&T"). The terms and conditions of petitioner's employment, and AT&T's rights and obligations, were

governed by a collective bargaining agreement between AT&T and the Communications Workers of America. This collective bargaining agreement applied to all AT&T bargaining unit employees in several states, including Virginia. Pet. App. 13a.

This labor contract states that AT&T has the exclusive "right to manage the business and to direct the working forces and operations of the same, subject to the limitations of this Agreement." C.A. App. 41. The labor contract, and an attendant letter agreement, also require AT&T to act with "responsibility and respect" for the benefit of its employees and to act with "respect, integrity [and] trust" to serve the employees' interests. C.A. App. 45-46.

The labor contract further establishes a broad grievance procedure covering employee disputes "arising with respect to wages, hours of work and other conditions of employment." C.A. App. 42. With certain limited exceptions not relevant here, the contract provides for final and binding arbitration of "[a]ny dispute arising between the UNION and the COMPANY with respect to the interpretation of any provision of this Agreement or the performance of any obligation hereunder." C.A. App. 42, 44.

2. On September 11, 1986, petitioner left work early, claiming to be ill. In the ensuing weeks, AT&T made repeated attempts to contact petitioner about his medical and employment status. Each was unsuccessful. On September 26, AT&T notified petitioner that his employment would be terminated if he did not report to work by September 30. When petitioner failed to do so, AT&T terminated his employment by letter dated October 1, 1986.

Petitioner previously had been provided a work locker as a condition of his employment. Because petitioner had abandoned his job, his supervisor, respondent Cameron Allen, entered the locker with a Company passkey on

October 2, 1986. Allen recovered Company-owned tools and cleaned out the locker so it could be used by another employee. In so doing, Allen discarded items from the locker that appeared to be trash.

Later that day, a Union shop steward complained to both Allen and her supervisor about Allen's handling of the work locker. The shop steward stated that some of petitioner's co-workers had found a personal letter to petitioner in the trash and complained that Allen should not have entered and cleaned out the locker without the presence of a Union representative.

On October 3, 1986, petitioner returned to AT&T. During a meeting in which he was represented by a Union steward, petitioner was reinstated. In that meeting, both petitioner and his Union representative discussed Allen's entry into petitioner's locker.

Later on October 3, petitioner walked off the job and never returned. AT&T terminated his employment for job abandonment effective October 3. Petitioner never filed a grievance about either his termination or AT&T's actions with respect to his work locker, although the labor contract authorized such grievances.

3. Fourteen months after his termination, petitioner commenced this action in Virginia state court. He alleged that, by entering the Company locker without authorization and handling the contents of the locker, respondents committed torts of intentional and negligent infliction of emotional distress, conversion, and negligence. As the crux of each of these claims, petitioner alleged that respondents did not have "permission" or "legal authority" to enter and clean out his work locker and that, by doing so, respondents violated numerous duties they owed to petitioner.

Specifically, petitioner's complaint alleged that respondents had violated a number of related "duties": "to hold for a reasonable amount of time" the contents of his work

locker; to "return or make available to [petitioner]" the contents of his locker; to "restrict . . . access" to the contents of the locker; and "to not conduct themselves in such a manner" that would likely cause petitioner emotional distress. C.A. App. 9-10. By violating these asserted duties in its allegedly unauthorized treatment of his work locker, petitioner claimed that respondents' conduct was "negligent," "reckless," and "outrageous and intolerable." C.A. App. 10-11.

4. Respondents removed the action to federal court on the ground that petitioner's claims had to be treated as arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Respondents then moved for summary judgment because, *inter alia*, petitioner's claims were barred by the applicable statute of limitations under § 301. Petitioner moved to remand the action to state court.

The district court (Judge Robert R. Merhige, Jr.) denied petitioner's motion to remand and granted summary judgment to respondents. The court found that the gravamen of petitioner's complaint concerned the propriety of respondents' actions in entering and cleaning out his Company locker. Pet. App. 36a. The complaint therefore concerned "conditions of employment governed by a collective bargaining agreement." Pet. App. 39a. Because the state law claims petitioner asserted relied upon duties defined by the labor contract, the district court held that they were completely preempted by § 301 and properly removed to federal court. Pet. App. 38a.

5. The United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirmed.¹ Applying this Court's decisions in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); *Caterpillar Inc. v. Williams*, 482 U.S. 386

¹ The case initially was briefed and argued to a three-judge panel, but the Fourth Circuit decided to hear it *en banc* before the panel issued an opinion.

(1987); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the Fourth Circuit held that petitioner's claims were completely preempted because resolution of those claims necessarily would require interpretation of the labor contract. Pet. App. 6a-7a, 10a.

In reaching its decision, the Fourth Circuit carefully analyzed the elements of each of petitioner's claims and the labor contract provisions that related to them. Pet. App. 6a-7a. The court noted that Virginia law requires that an actor's conduct be "outrageous and intolerable" in order to establish a claim for intentional infliction of emotional distress, and that "[i]f management's actions in disposing of the contents of [petitioner's] locker were authorized under the collective bargaining agreement, those actions could not simultaneously be considered 'outrageous and intolerable' under Virginia law." Pet. App. 10a. Similarly, the court found that "each of the other charges require[s] recourse to the agreement to determine whether the alleged conduct was 'negligent' or 'wrongful.'" Pet. App. 11a. The court noted that it was petitioner's burden to prove wrongfulness under Virginia law. Pet. App. 7a.

Contrary to petitioner's misstatement, the court of appeals did not hold that petitioner's claims were preempted by § 301 because they "could be defended" on the ground that the labor contract authorized respondents' conduct. Pet. 5 (emphasis in Petition). Similarly, contrary to petitioner's misstatement (Pet. 11), respondents never argued that this case was preempted on the basis of any employer defense, and the majority opinion never referred to any employer defense. Instead, the court of appeals concluded:

State tort claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a "duty of care" exists or to define "the nature and scope of that duty. . . ." *Hechler*, 481 U.S. at 862. Whether the actions of management

personnel in disposing of the contents of [petitioner's] locker were in any way wrongful simply cannot be determined without examining the collective bargaining agreement to ascertain the extent of any duty [respondents] may have owed him.

Pet. App. 8a, 10a.

Judge Phillips, joined by two other judges, dissented. After a lengthy review of this Court's decisions, Judge Phillips argued that the majority had "gotten off the track" by "looking beyond [petitioner's] claims to the merits of [respondents'] § 301 preemption positions" to determine whether petitioner's claims were completely preempted (Pet. App. 26a). The dissent then independently reviewed the allegations of petitioner's complaint, and concluded that the complaint should be construed as grounding the duties allegedly violated by respondents "in an independent source, Virginia tort law," rather than, as the majority had concluded, in the labor contract (Pet. App. 28a).

REASONS FOR DENYING THE WRIT

This case involves nothing more than a dispute over the application of settled legal principles to a specific and rather unusual set of facts. In holding that petitioner's claims are preempted by § 301 of the LMRA, the Fourth Circuit applied the standard set forth in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Electrical Workers v. Hechler*, 481 U.S. 851 (1987); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). The Fourth Circuit held that petitioner's state law claims, by their necessary terms, "depend on the meaning of a collective bargaining agreement" and thus must be treated as arising under § 301 quite apart from any defense respondents would have. *Lingle*, 486 U.S. at 406; see *Caterpillar*, 482 U.S. at 398-99; *Lueck*, 471 U.S. at 213; *Hechler*, 481 U.S. at 858; Pet. App. 6a-7a, 10a.

This routine application of settled principles would not present any issues appropriate for review by this Court even if the narrow holding were incorrect—as it assuredly is not. Indeed, the only way petitioner can argue otherwise is by misstating the Fourth Circuit's holding and the decisions of other courts of appeals. In particular, petitioner maintains that the Fourth Circuit adopted two propositions over which the courts of appeals are said to be divided: (1) that state law claims can be completely preempted under § 301, and hence removed to federal court, based on a defense asserted by an employer that requires an interpretation of a labor contract; and (2) that intentional infliction of emotional distress claims are preempted under § 301 whenever they involve workplace behavior.

However, the Fourth Circuit did not—and could not—adopt either of these propositions. Further, there is no conflict among the courts of appeals on either of these issues.

I. NEITHER THE FOURTH CIRCUIT NOR ANY COURT OF APPEALS HAS HELD THAT AN EMPLOYER'S DEFENSES MAY ESTABLISH COMPLETE PREEMPTION UNDER SECTION 301.

Petitioner asserts that the courts of appeals are in “hopeless conflict” (Pet. 8) about whether complete preemption under § 301 may be predicated on an employer defense that requires interpretation of a labor contract. The alleged “conflict” is wholly manufactured. There is no disagreement among the courts of appeals on this issue. Nor could there be because this Court squarely held in *Caterpillar* that employer defenses may *not* be the basis of complete preemption under § 301. *Caterpillar*, 482 U.S. at 398-99.

A. There Is No Conflict Among The Circuits on Preemption by Employer Defenses.

In seeking to manufacture a conflict, petitioner has mischaracterized decisions of the First, Eighth, and Ninth Circuits. These decisions do not hold that § 301 preemption can be based on a defense that requires interpretation of a labor contract.

To the contrary, these circuits recognize, as required by *Caterpillar*, that complete preemption applies only when resolution of a *plaintiff's* state law claim depends upon interpretation of the labor contract. See *Magerer v. John Sexton & Co.*, 912 F.2d 525, 530 (1st Cir. 1990) ("resolution of plaintiff's statutory retaliatory discharge *claim* depends on an interpretation of the collective bargaining agreement" because state law created a negotiable standard) (emphasis added); *Utility Workers of America v. Southern California Edison Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (plaintiff's "constitutional *claims* are 'substantially dependent' upon the analysis of the collective bargaining agreement" to determine whether drug testing constituted unreasonable search and seizure) (emphasis added).²

² Neither *Magerer* nor *Utility Workers* even addresses the possibility that preemption could be based on an employer *defense*. The Eighth Circuit's 1988 decision in *Hanks I* raised the *possibility* that a claim could be preempted based on an employer's affirmative defense. *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988). It did so, however, in the context of a case where removal jurisdiction was independently based on diversity of citizenship. If a federal court has an independent basis for jurisdiction such as diversity, then, of course, it must resolve the dispute on the merits—including any employer defenses grounded in § 301 preemption. See *Caterpillar*, 482 U.S. at 397, 398 n.13; Pet. App. 29a. Thus, the complete preemption rule of *Caterpillar*, *supra*—requiring that the court focus only on whether the plaintiff's claims require interpretation of a labor agreement—did not apply in *Hanks*. See also *Hanks II*, 906 F.2d 341, 344 (8th Cir. 1990) (reviewing both the employee claims and employer defenses when the case returned after remand). In *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989), the court quoted the language in *Hanks I* in a case where

Similarly, although the Petition cites decisions in which § 301 preemption was denied, none demonstrates a conflict on the question whether preemption may be based on a defense. Rather, they represent application of the same preemption standard to specific claims whose resolution did not require reference to the labor contract. See *Smolarek v. Chrysler Corp.*, 879 F.2d 1326, 1332 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 539 (1989) (resolution of plaintiff's handicap discrimination claim did not require reference to labor contract); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 886 (10th Cir.), *cert. denied*, 486 U.S. 1055 (1988) (resolution of plaintiff's claims under Utah blacklisting statute did not require reference to labor contract).

Petitioner seeks to bolster his assertion that there is a conflict by relying upon a statement to that effect in the dissenting opinion below (Pet. 8). But although the dissenting opinion stated that its disagreement with the majority "reflects a wider inter-circuit conflict on this issue that has developed in recent years" (Pet. App. 14a), the *only* decisions cited by the dissent in support of an inter-circuit conflict involved the application of this Court's preemption standard to various claims for intentional infliction of emotional distress. Pet. App. 29a n.4. Neither the dissenting opinion nor the Petition cites a single court of appeals decision decided after *Caterpillar* holding that employer defenses may be relied upon as a basis for finding complete preemption under § 301.

B. This Court Definitively Resolved The Employer Defense Issue In *Caterpillar*.

The absence of a circuit conflict is hardly surprising, given that this Court definitively resolved the issue in

removal was based on complete preemption. But the court did not examine any employer defenses in determining whether the claims were completely preempted, and it does not appear from the opinion that the question whether employer defenses could be considered was at issue.

1987. In its unanimous opinion in *Caterpillar*, *supra*, the Court stated:

Caterpillar argues that § 301 pre-empts a state-law claim *even when the employer raises only a defense* that requires a court to interpret or apply a collective bargaining agreement. . . . But the presence of a federal question, even a § 301 question, in a defensive argument *does not* overcome the paramount policies embodied in the well-pleaded complaint rule. . . . [A] defendant *cannot*, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

482 U.S. at 398-99 (emphases altered from original). A plainer resolution of this issue cannot be imagined. Indeed, petitioner concedes that the employer defense issue was "directly raised" in *Caterpillar* "and the Court was equally direct in answering." Pet. 13.

Nonetheless, petitioner also incongruously suggests that "one passage" in the Court's subsequent decision in *Lingle* "could be read to suggest" that the issue is still open. Pet. 14. That passage describes various factual issues presented by the state law claim in that case and then concludes:

Thus, the state-law remedy in this case is "independent" of the collective bargaining agreement in the sense of "independent" that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective bargaining agreement.

486 U.S. at 407, quoted at Pet. 14. Petitioner does not explain how this sentence could possibly be read as overruling the unanimous decision in *Caterpillar* one year earlier, especially when *Caterpillar* was cited with approval by *Lingle*. See 486 U.S. at 410 n.10. Indeed, petitioner hastens to disclaim any such reading, as-

serting that “[t]here is . . . no indication that *Lingle* intended so casually to overrule *Caterpillar* on a question directly raised and decided *only* in the earlier case.” Pet. 14 (emphases in Petition).

What is obvious to petitioner is also obvious to the courts of appeals. Although petitioner, like the dissenting opinion (Pet. App. 24a n.2), refers cryptically to “confusion sowed by the courts of appeals’ various readings of *Lingle*” (Pet. 16), neither the Petition nor the dissenting opinion cites a *single* court of appeals decision that has read *Lingle* as qualifying the express holding of *Caterpillar*.³ Petitioner’s suggestion that there is widespread confusion in the lower courts is created out of whole cloth.

C. The Fourth Circuit Never Considered Or Ruled On Any Employer Defense.

Even if there were a conflict on this question, it would be irrelevant to the decision here. The Fourth Circuit never even *mentioned* any defenses AT&T might raise to petitioner’s claims, let alone ruled that petitioner’s claims were preempted because of any defense. Instead, the Fourth Circuit’s analysis correctly followed the clear mandate provided by this Court’s decisions in *Lueck*, *Caterpillar*, *Hechler*, and *Lingle*. The Fourth Circuit held that petitioner’s state law claims were preempted because his claims for relief necessarily depended on duties created and defined by the labor contract. Pet.

³ To the contrary, the lower courts have clearly recognized that *Lingle* does not qualify *Caterpillar*. For example, in *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991), the plaintiff argued, as petitioner does here, that the Ninth Circuit’s preemption test ignored the requirements of *Caterpillar*. In rejecting this argument, the Ninth Circuit explained that, unlike the contract interpretation issue in *Caterpillar*, which was raised by the employer’s defense, the contract construction issue there was “part and parcel of the prima facie claim itself, subjecting that claim to federal jurisdiction.” *Id.* at 1270.

App. 8a, 10a. Because the Fourth Circuit did not rule that a labor contract defense is a proper basis for preemption, there is no basis to grant review to consider that issue.

II. THERE IS NO CIRCUIT CONFLICT OR CONFUSION ABOUT THE STANDARD FOR ASSESSING CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Petitioner also urges that this Court grant certiorari to resolve an alleged "multi-faceted circuit conflict" (Pet. 17) over whether claims of intentional infliction of emotional distress are preempted by § 301 "whenever the actions complained of involve workplace behavior by the employer or an agent of the employer." Pet. i. Again, petitioner has created a spurious conflict on an issue not presented by the decision below.

A. There Is No Circuit Conflict On Whether Intentional Infliction Claims Are Preempted Whenever Workplace Behavior Is Involved.

Contrary to petitioner's assertion, no circuit has held that intentional infliction claims are necessarily preempted by § 301 *whenever* they involve "workplace behavior" or the "manner of discipline or discharge." Pet. i, 10. Instead, the lower courts have engaged in a case-by-case application of the standard established by this Court's cases to determine whether resolution of each particular claim of intentional infliction of emotional distress requires interpretation of the applicable labor contract. Labor contracts frequently address "workplace behavior," discipline, and discharge. Consequently, it is hardly surprising that intentional infliction claims related to these areas frequently are held to be preempted when, as here, resolution of the claims requires interpretation of labor contract provisions. But no court, including the Fourth Circuit below, has adopted a *per se*

rule to the effect that all intentional infliction claims are preempted whenever they involve workplace behavior.

The dissenting opinion observed that some courts of appeals have found intentional infliction claims preempted and others have held that such claims are not preempted. Pet. App. 29a n.4. But this is the inevitable consequence of any regime requiring courts to apply a general legal standard to widely disparate fact situations and labor contracts. Although individual judges may disagree about the proper application of that standard in specific circumstances—as they did here—this does not mean that there is any disagreement about the relevant standard.⁴

Petitioner quotes statements from various courts of appeals that use slightly different words in describing the relevant inquiry in determining whether intentional infliction claims are preempted by § 301. Pet. 18-23. Petitioner notes that the Third Circuit has said the ques-

⁴ Moreover, although there will always be disagreements about how a standard should be applied to particular facts—especially in unusual cases like the present one—it does not follow that recurring patterns will not emerge over time. For example, intentional infliction claims that require the court to interpret the discipline and discharge provisions of the labor contract generally have been held to be preempted. See, e.g., *Brown v. Southwestern Bell Telephone Co.*, 901 F.2d 1250 (5th Cir. 1990); *Douglas v. American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989); *Harris v. Alumax Mill Products, Inc.*, 807 F.2d 400 (9th Cir.), cert. denied, 111 S. Ct. 102 (1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990). On the other hand, intentional infliction claims based on allegations of personal harassment that do not require an analysis of any labor contract provisions generally have been held not to be preempted. See, e.g., *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3d Cir. 1990) (claims regarding harassing comments and actions); *For v. Parker Hannifan Corp.*, 914 F.2d 795 (6th Cir. 1990) (claims based on harassment, not underlying discharge); *Keck v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (7th Cir. 1977) (claim based on personal, racially derogatory comment).

tion is whether such claims are "clearly outside the scope of the collective bargaining agreement," *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111, 114 (3d Cir. 1990); the Sixth Circuit has framed the question as whether the employer "could have tortiously caused [plaintiff's] emotional distress without violating the contract," *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989); the Ninth Circuit's characterization is whether "[t]he collective bargaining agreement does not envision such behavior," *Tellez v. Pacific Gas & Electric Co.*, 817 F.2d 536, 539 (9th Cir.), *cert. denied*, 484 U.S. 908 (1987); and the Seventh Circuit has said the question is whether the "claim consists of allegedly wrongful acts directly related to the terms and conditions of [plaintiff's] employment." *Douglas v. American Information Technologies Corp.*, 877 F.2d 565, 572 n.10 (7th Cir. 1989).

But the slight variations in these verbal formulas do not indicate that the courts are applying different legal standards. To the contrary, they are simply alternative ways of expressing the same idea: that intentional infliction claims will be preempted if they require a court to interpret a labor agreement. Petitioner cannot show that any of the cited cases would have been decided differently if the verbal formula of one circuit rather than another had been applied, or indeed that the present case would have been decided differently if the formula of any other circuit had been applied.⁵

⁵ Petitioner notes (Pet. 20) that the Eighth Circuit in a footnote in *Hanks II* disagreed with a portion of the Ninth Circuit's analysis in *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), but he omits some critical language from the Eighth Circuit's footnote. The Eighth Circuit said: "Inasmuch as the opinion of the Ninth Circuit in *Miller v. AT&T Network [Systems]*, 850 F.2d 543 (9th Cir. 1988), would suggest a result different from the one indicated by the [*United Steelworkers of America v. Rawson*, [110 S. Ct. 1904, 1910 (1990)] dicta, we disagree." 906 F.2d at 344 n.4. The issue raised by the "*Rawson* dicta"—whether there is no preemption under § 301 if the defendant has violated a general duty

B. The Issue Whether Intentional Infliction Claims Are Preempted Whenever They Involve Workplace Behavior Is Not Presented In This Case.

Even if there were a conflict among the circuits regarding the proper treatment of intentional infliction cases, the issue presented by petitioner could not be resolved in this case. The Fourth Circuit did not hold that intentional infliction claims are preempted *whenever* they involve workplace behavior. *Compare* Pet. i. Rather, it decided a much more limited issue: whether a bargaining unit employee's intentional infliction claim alleging unauthorized entry and cleaning out of his work locker (the issuance of which was a condition of his employment) was preempted by § 301 when it would be necessary to interpret the applicable labor contract to resolve the claim. Because the broader question presented by the Petition was not addressed or ruled on by the Fourth Circuit, it may not serve as a basis for granting the writ.

owed to all citizens—is different from the issue petitioner presents here. In any event, the Ninth Circuit should be allowed to respond to this Court's decision in *Rawson*, which was handed down after the Ninth Circuit's decision in *Miller*, before concluding that the Ninth Circuit and the Eighth Circuit are in disagreement about the proper reading of that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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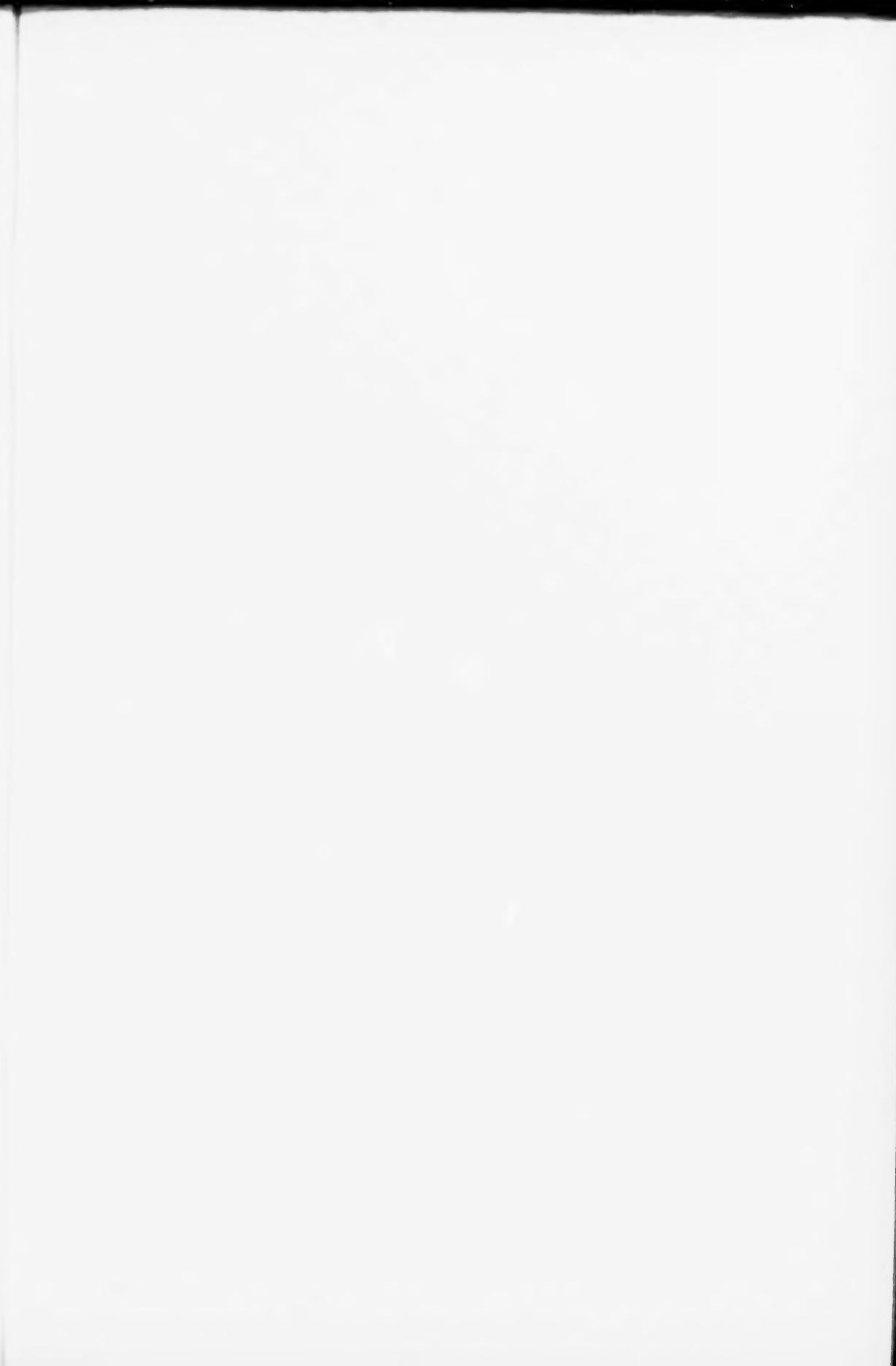
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(2)
No. 91-515

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MCCORMICK,
Petitioner,

v.

AT & T TECHNOLOGIES, INC., and CAMERON ALLEN,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition is principally devoted to the proposition that the many federal judges, including the three dissenting judges in this case below, who perceive conflict and confusion in the courts of appeals on two Labor Management Relations Act § 301 preemption questions raised in our *certiorari* petition are unable to read and understand the decisions that appear in the Federal Reporter Second.

Compare Brief for Respondents in Opposition ("Br. Opp.") at 1, 7, 12 (contending that there is no circuit conflict over either the general legal standard for § 301 preemption cases or the application of that standard to intentional infliction of emotional distress tort cases) *with* Pet. App. 14a (the analytic disagreement between the majority and the dissent in this case "reflects a wider inter-circuit conflict on this issue that has developed in recent years as the lower federal courts have sought to apply the Supreme Court precedents."); *Galvez v. Kuhn*, 933 F.2d 773, 775 (1991) (despite "authoritative statements to guide our way [in] . . . *Lingle* [*v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)] . . . [i]n reality section 301 has been the precipitate of a series of often contradictory decisions. . . ."); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015, 1021 (10th Cir. 1990) ("other circuits have reached varying results when applying the *Allis Chalmers* [*Corp. v. Lueck*, 471 U.S. 202 (1985)] and *Lingle* holding to state tort claims for intentional infliction of emotional distress"); *id.* (referring to the "conflicting results" among the circuits in such preemption cases); *Hanks v. General Motors Corp.*, 906 F.2d 341, 344 n.4 (8th Cir. 1990) ("Inasmuch as the opinion in *Miller v. AT&T Network Services* [850 F.2d 543, 550 (9th Cir. 1988)] . . . would suggest a result different from the one indicated [with regard to intentional infliction of emotional distress tort actions] . . . we disagree.")

Given the inherent implausibility of respondents' thesis it is not surprising that it is respondents—not the fed-

eral appellate judiciary—who are guilty of misreading and misunderstanding the pertinent court of appeals § 301 preemption cases.

1. First, contrary to respondents' submissions (Br. Opp. at 8-9), there is indubitably a square circuit conflict as to whether § 301 preemption can properly be based on a *defense* that requires interpretation of a labor contract.

To begin at the most obvious point, the Eighth Circuit has repeatedly, explicitly, and squarely held that § 301 preempts state causes of action not only when the plaintiff's case as articulated in the complaint necessarily depends upon construction of the collective bargaining agreement, but also when it is anticipated that there will be a defense raised that will require interpretation of the agreement. *Hanks v. General Motors Corp.*, 859 F. 2d 67, 70 (8th Cir. 1988) (*Hanks I*); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989); *Hanks v. General Motors Corp.*, *supra*, 906 F.2d at 344 (*Hanks II*).¹

Respondent would blunt the force of these three square holdings by distinguishing *Hanks I* as a case in which there was federal diversity jurisdiction, so that "any employer defenses grounded in section 301 preemption" thereby became pertinent. Br. Opp. at 8 n.2. But nothing in *Hanks I* (or *Hanks II*) indicates that the relevance of

¹ In so doing, the Eighth Circuit relied upon precisely the passage from *Lingle, supra*, (486 U.S. at 407) that we identified in our *certiorari* petition, and that Judge Phillips noted in his dissent, as the probable source of the confusion in the lower federal courts concerning the claim-centered nature of § 301 preemption. See Pet. at 14-16; Pet. App. 24a-25a n.2; compare *Hanks I*, 859 F.2d at 69.

While it is gratifying that respondents agree with us, and with Judge Phillips, that it is "obvious" that this passage could not have been intended to qualify or overrule the explicit holding of *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (Br. Opp. at 11), respondents' concession in a brief is not binding judicial precedent, and consequently cannot alone cure lower court misapprehensions of *Lingle* in this regard. Rather, only a clarification from this Court after plenary review will have that effect.

a defense to determining a § 301 preemption issue turns on whether there is both diversity and federal question jurisdiction or only federal question jurisdiction.² And the Eighth Circuit, later, in *Johnson v. Anheuser Busch, supra*, both quoted and applied its holding that defenses must be considered in determining § 301 preemption to a case that, like this one, plainly did *not* rest on any claim of diversity jurisdiction. 876 F.2d at 623; *id.* at 624 (anticipating that employer and co-workers would defend an intentional infliction of emotional distress cause of action relating to false accusations leading to arrest, prosecution, and discharge on the basis that the “discharge was warranted under the collective bargaining agreement,” and finding that “[t]herefore, section 301 preempts this count.”)

Additionally, and again contrary to respondents’ presentation (Br. Opp. at 8), the First and Ninth Circuits—as well as the Fourth and Eighth Circuits—have relied upon anticipated defenses in determining § 301 preemption questions generally. *Magerer v. John Sexton & Co.*, 912 F.2d 525, 527 (1st Cir. 1990); *Laws v. Calmat*, 852 F.2d 430, 432, 433 (9th Cir. 1988).³

² Indeed, the removal in *Hanks* was based on *both* diversity and federal question jurisdiction, and the appellate opinions indicate only that General Motors claimed diversity jurisdiction, not that jurisdiction was indeed proper on that basis. 859 F.2d at 68; 906 F.2d at 342.

³ Although respondents contend otherwise, the First and Ninth Circuits clearly *have* relied upon proffered defenses in concluding that state causes of action cannot go forward because the ultimate resolution of the case is likely to involve interpretation of the collective bargaining agreement.

The First Circuit, for example, in *Magerer v. John Sexton & Co.*, 912 F.2d 525 (1st Cir. 1990), held preempted under § 301 a cause of action that, as pleaded, was identical to the retaliatory discharge claim involved in *Lingle, supra*. The retaliatory discharge statute in question in *Magerer*, however, permitted a collective bargaining agreement to “waive rights granted by this section.” 912 F.2d at 529. *Magerer* held the mere availability of this waiver defense determinative in holding the cause of action entirely preempted by

In contrast, the Sixth and Tenth Cases have emphatically eschewed reliance on anticipated defenses in determining § 301 preemption questions generally. See *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987).

Thus, respondents proffered distinction of *Hanks* would not, even if accurate, eliminate the deep cleavage in the circuits in this regard.

2. Indeed, that cleavage has been, if anything, deepened by the recent acceptance of a similar distinction by the Seventh Circuit. *Smith v. Colgate Palmolive Co.*, 943 F.2d 764, 770-71 (7th Cir. 1991) (acknowledging that *Caterpillar Inc. v. Williams*, *supra*, establishes a claim-centered principle, but maintaining that it is permissible to "look[] beyond the plaintiffs' complaint to the defenses" in determining whether a state cause of action is substantively precluded).

After *Smith*, it appears that there are now *three* different views among the federal courts of appeal, rather than only two, on the first question presented in our *certiorari* petition, with two circuits holding that defenses never are relevant to § 301 preemption, four circuits holding that such defenses always are relevant, and one circuit maintaining that whether or not such defenses are relevant depends upon whether the question is jurisdictional or substantive.

3. The distinction suggested by respondents and accepted by the Seventh Circuit in *Smith* between § 301

§ 301, with the result that the plaintiff had no opportunity to litigate whether or not any waiver had in fact occurred and, if not, to go forward on the complaint as pleaded. Similarly, in *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086 (9th Cir. 1988) and *Laws v. Calmat*, *supra*, 852 F.2d at 432-33, the Ninth Circuit relied upon a potential contractual waiver defense as the basis for finding preempted causes of action premised upon state constitutional privacy protections and not reliant in any way upon any contractual considerations.

preemption for jurisdictional purposes and § 301 preemption for substantive purposes is, moreover, flatly inconsistent with this Court's cases.

Of the five cases in this Court concerning § 301 preemption of state causes of action, three have arisen in circumstances in which the preemption issue had no jurisdictional consequences. *Allis Chalmers v. Lueck*, *supra* (state court case, not removed); *Lingle*, *supra* (case removed to federal court on the basis of diversity of citizenship and then dismissed on § 301 preemption grounds); *Steelworkers v. Rawson*, — U.S. —, 110 S. Ct. 1904 (1990) (state court case, not removed).

The two cases that did decide jurisdictional questions—*Caterpillar, Inc. v. Williams*, *supra*, and *Electrical Workers v. Hechler*, 481 U.S. 851 (1987)—relied directly upon *Allis Chalmers v. Lueck* and did not purport to apply a different preemption standard. See, e.g., *Electrical Workers*, 481 U.S. at 859 (applying “the principle set forth in *Allis Chalmers*” to determine “if respondent’s claim is sufficiently independent of the collective bargaining agreement to withstand the preemptive force of § 301”); *Caterpillar*, 481 U.S. at 394-395 (applying standard developed in *Allis Chalmers* and applied in *Electrical Workers*).

As the concordance between these two sets of cases in this Court indicates, there is no basis in § 301 preemption law for respondents’ suggestion that there is a different § 301 preemption standard where the issue is “jurisdictional” and where the issue is “substantive.”

4. Respondents also maintain that even if there is discord in the circuits on the proper analytic approach to § 301 preemption cases generally, the Fourth Circuit, in deciding whether the various state tort causes of action pleaded by Mr. McCormick are all preempted, did not embrace or apply the proposition that anticipated defenses are pertinent. Br. Opp. 11-12.

The dissenters in this case obviously did not so understand the majority opinion. That is why the dissent de-

voted nearly twenty pages to explaining a "disagreement [that] . . . is fundamental" with the majority's entire mode of preemption analysis. Pet. App. 14a. As that dissent cogently explained, the majority approach does in fact turn preemption of the intentional infliction of emotional distress claim here on the defendants' probable defense, rather than only upon the plaintiff's necessary reliance on the collective bargaining agreement in his affirmative claims:

The majority . . . essentially finds this claim preempted because . . . its proof necessarily will require proof of "wrongful conduct" by the employer. From this, the reasoning proceeds that inevitably this will require proof of all the circumstances relevant to the conduct's occurrence; that one of the circumstances will be the labor contract between the parties; that this will require interpretation of that contract, and that that does it: the claim is preempted

The [majority's] analysis of how litigation of this claim in a civil action probably would proceed is likely an accurate one, but . . . it is irrelevant to the much simpler, true preemption issue: whether McCormick's well-pleaded state-law tort claim locates the duty allegedly violated by AT&T in their labor contract or in some source of legal duty independent of that contract. The answer to that issue is plain: in an independent source, Virginia tort law. Specifically, in the duty imposed by that body of law upon all persons, running to society in general and not dependent upon any employment relationships, (1) not to engage in intentional or reckless conduct (2) that is outrageous and intolerable, offending generally accepted standards of decency and (3) that causes (4) severe emotional distress to a plaintiff. . . McCormick's claim obviously does not seek to locate any such duty, either expressly or by necessary implication, in any special obligation imposed on AT&T by its labor contract, as did the preempted claims, for example, in *Lueck*, *Hechler*, and *Rawson*.

The fact that in defending against the claims . . . AT&T may be entitled . . . to rely on provisions of its labor contract to demonstrate that its conduct in con-

formity with them could not be considered "outrageous" is at this point in the process beside the point. That would be to invoke a federal defense (the labor contract's terms) [Pet. App. 28a-29a.]

See also *id.* at 30a-32a (similar analyses of the remaining state tort causes of action).

Moreover, in two cases decided since this one, the Fourth Circuit itself has confirmed, relying on the decision below, that its circuit law does indeed look to defenses to determine § 301 preemption issues. See *White v. National Steel Corp.*, 938 F.2d 474, 483 (4th Cir.), *cert. denied*, — U.S. —, 60 L.W. 3375 (1991) (determining that because plaintiffs' claims hinge on oral agreements separate from the collective bargaining agreement and because "National's defenses . . . are not based in a collective bargaining agreement . . . nor must a factfinder interpret any provisions of a collective agreement in order to determine these issues[, p]laintiffs' asserted rights are, therefore, not preempted by section 301."); *Lepore v. Ramsey*, 1991 U.S. App. Lexis 23211 (4th Cir., Oct. 7, 1991) (emphasis supplied) ("Under the *McCormick* reasoning, it would be necessary in assessing the fault of all of these defendants under these tort claims to interpret the provisions of the collective bargaining agreement that defined their duties to Lepore allegedly violated, or that gave rise to defenses to those claims. On that basis, on the authority of *McCormick*, all these claims were properly held preempted. . . .")⁴

Thus, while respondents may not understand the decision below as holding that "an employer's defenses may

⁴ *Lepore* is an unpublished opinion. Fourth Circuit rules discourage but do not forbid citation of unpublished opinions within the Fourth Circuit, and do not specify whether such opinions can be cited outside that circuit. I.O.P. 36.5 of the United States Court of Appeals for the Fourth Circuit. For this Court's convenience, we have filed copies of the *Lepore* decision with the Clerk's office. For present purposes, the importance of *Lepore* is not as precedent, but to demonstrate that, unless this case is reviewed and reversed, cases will continue to be decided in the Fourth Circuit on the basis of a § 301 preemption analysis in conflict with that of other circuits.

establish complete preemption under section 301" (Br. Opp. at 7), the Fourth Circuit Judges who participated in the *McCormick* decision certainly do, and are applying that principle to the cases before them.

5. Finally, respondents characterize the courts of appeals opinions on § 301 preemption of intentional infliction of emotional distress claims in particular as harmonious, maintaining that the seemingly conflicting legal standards applied by the various circuits are simply "slight variations in verbal formulas." Br. Opp. at 13-14. But these admitted variations are not, as respondents would have it, simply different ways of saying the same thing; rather, there is a difference of principle. That difference concerns whether such cases of action are preempted, as the Fourth, Fifth, Tenth (and to some extent the Seventh and Ninth Circuits) maintain, merely because the employer can argue that its behavior is not "outrageous" since the actions in question are consistent with the collective bargaining agreement, or whether, instead, as the Third, Sixth and Eighth Circuits hold, that possible contention is not a basis for § 301 preemption. See Pet. 16-23.

Further, as we demonstrated in some detail in our *certiorari* petition, this difference in the governing standards dictates different results in identical cases. Thus, the state tort cause of action in this case could not have been declared preempted under the standards applied in the Third, Sixth, and Eighth Circuits, probably would not have been declared preempted under the Ninth Circuit's most recent cases, and may or may not have been held preempted in the Seventh Circuit. Pet. at 18-19, 21 n.7, 22 n.9, 23.⁵

⁵ Since the *certiorari* petition was filed, the Ninth Circuit has once more held that intentional infliction of emotional distress claims may be preempted or not, depending upon whether the collective bargaining agreement in some specific way addresses the validity of the actions claimed to be tortious. *Milne Employees Association v. Sun Carriers, Inc.*, — F.2d —, — (9th Cir. Nov. 20, 1991).

Indeed, conflict in result in indistinguishable cases is not merely hypothetical but has already occurred. For example, the Eighth Circuit in *Hanks I* and *II*, and the Sixth Circuit in *O'Shea v. Detroit News*, *supra*, held not preempted state causes of action for intentional infliction of emotional distress premised upon job assignments alleged to have resulted in severe emotional injury.⁶ In both instances, the courts of appeals recognized that the employer's contention that the job assignment was appropriate under the collective bargaining agreement might be relevant in determining the intentional-infliction-of-emotional-distress "outrageous conduct" element, and that the assignment could have been grieved under that agreement. *Hanks II*, 906 F.2d at 344-45; *O'Shea*, 887 F.2d at 686-87; *see also Knafel v. Pepsi-Cola Bottlers*, 899 F.2d 1473, 1476, 1483 (7th Cir. 1990) (finding non-preempted an intentional-infliction-of-emotional-distress cause of action premised in part upon job assignment).

In contrast, the Ninth Circuit in *Miller v. AT&T Network Services*, *supra*, preempted an intentional-infliction-of-emotional-distress claim premised upon a job assignment known to endanger the plaintiff's health on the same theory adopted by the Fourth Circuit here, *viz.*, that the resolution of the "outrageous conduct" element of such causes of action may be influenced by the employer's claim that its action did not violate the collective bargaining agreement. 850 F.2d at 50-51; *see also*, preempting a similar job assignment-related cause of action, *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 239 (9th Cir. 1990); *compare* Pet. App. 10a.⁷

Similarly, the Tenth Circuit in *Johnson v. Beatrice Foods*, *supra*, preempted allegations of name calling,

⁶ Respondent's attempt to find a "recurring pattern" in the facially inconsistent court of appeals intentional infliction of emotional distress/§ 301 preemption cases tellingly leaves out both *Hanks* and *O'Shea*. Br. Opp. at 13.

⁷ The Fourth Circuit majority, in this case, expressly relied on *Miller*. *See* Pet. App. 11a.

surveillance, shunning, public ridicule, verbal abuse, harassing job assignments, and other harassing behavior both in and out of the workplace that focussed on the manner of treatment, not its substance. 921 F.2d at 1017-18. See also *Lepore v. Ramsey, supra* (intentional infliction of emotional distress claim based on verbal sexual harassment preempted). These allegations are indistinguishable for § 301 preemption purposes from the allegations of harassing behavior underlying the nonpreempted intentional-infliction-of-emotional-distress causes of action in, for example, *Krashna v. Oliver Realty, Inc.*, 895 F.2d 111 (3rd Cir. 1990) (racial insults); *Galvez v. Kuhn, supra* (racial slurs); and *Fox v. Parker Hannifan Corp.*, 914 F.2d 795, 802 (7th Cir. 1990) (unspecified harassing behavior in and out of the workplace).

As these examples illustrate, unless this Court grants *certiorari* in this case, the issuance of conflicting court of appeals' decisions such as those we have enumerated above will continue apace.

CONCLUSION

For the reasons stated above and in our Petition for Writ of *Certiorari*, this Court should grant *certiorari* in this case and reverse the decision below.

Respectfully submitted,

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